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PRECEDENTS
OF
INDICTMENTS AND PLEAS,

ADAPTED TO THE USE BOTH OF THE
COURTS OF THE UNITED STATES

AND THOSE OF ALL THE
SEVERAL STATES;

TOGETHER WITH NOTES ON
CRIMINAL PLEADING AND PRACTICE,

EMBRACING THE
ENGLISH AND AMERICAN AUTHORITIES GENERALLY.

BY
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AUTHOR OF TREATISES ON CRIMINAL LAW ; ON EVIDENCE ; ON NEGLIGENCE ;
AND ON MEDICAL JURISPRUDENCE.

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BOOK V.

OFFENCES AGAINST SOCIETY.

CHAPTER I.

PERJURY.(a)

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- (587) In charging J. K. with larceny before a justice of the peace.
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(a) See Wh. Cr. L. 8th ed. §§ 1245 *et seq.*

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(577) *General frame of indictment. Perjury in swearing an alibi for a felon.*(b)

That at the court, etc. (*setting forth the style of the court*),(c) before, etc. (*stating the members of the court*), one G. B. was in due

(b) Stark. C. P. 459.

(c) The object of this part of the indictment, as is stated by Mr. Chitty, on whose authority (2 Chit. C. L. 307) a large portion of the following notes rests, is to render the assignments of perjury intelligible, where they would otherwise require explanation. It is not safe, however, to go beyond what is actually essential for the purpose. Wh. Cr. L. 8th ed. §§ 1292 *et seq.* Thus, it is unnecessary to set out the continuances of the former prosecution, or to state out of what office process issued, in case of perjury, on a bill of Middlesex, though, if a wrong

form of law tried upon a certain indictment then and there depending against him, and of which said court had jurisdiction,^(d)

office be stated, the indictment would be defective (Peake, N. P. 112; Cro. C. C. 339, 356); and where a complaint was made *ore tenus*, by a solicitor to the court of chancery, of an arrest in returning home after the hearing of a cause, it was held sufficient to state, that "at and upon the hearing of the said complaint the defendant swore," etc., and there was no occasion for any positive averment of the hearing of the application. *R. v. Aylett*, 1 T. R. 71. The usual and most regular course is to aver that a certain cause had arisen, and was depending, and came on to be tried in due form of law, or that at such a court J. K. was in due form of law tried on a certain indictment then and there depending against him for murder, and that the perjury was committed on the trial either of the civil or criminal proceeding. *R. v. Dowlin*, 5 T. R. 311; Cro. C. C. 7th ed. 612, n. a; *State v. Sleeper*, 37 Vt. 122. The averment of jurisdiction is essential. *R. v. Overton*, 4 Q. B. 83; 3 G. & D. 133; *State v. Lamont*, 2 Wis. 437; *Morrell v. People*, 32 Ill. 499. That the proceedings should appear to have been judicial, is essential. Wh. Cr. L. 8th ed. §§ 1292 *et seq.* A variance in setting out this matter of inducement would be fatal, if the matter stated could not be rejected as surplusage. A clerical error will be no variance. *R. v. Dowlin*, 5 T. R. 311; *R. v. Leefe*, 2 Campb. 139; *R. v. May*, 1 Leach, 192; *R. v. Taylor*, 1 Campb. 404; *R. v. Eden*, 1 Esp. R. 97; 1 Ld. Raym. 701. If the indictment disclose an irregularity that would have been curable, this does not vitiate. Wh. Cr. L. 8th ed. § 1294. *State v. Shanks*, 66 Mo. 560. It is otherwise when failure as to essential prerequisites appears. *R. v. Crossley*, 7 T. R. 315; *R. v. Harley*, 1 C. & P. 258; R. & M. 94; *State v. Langley*, 34 N. H. 529; *State v. Freeman*, 15 Vt. 723. Where the indictment purported to set out the substance and effect of the bill, and stated an agreement between the prosecutor and defendant respecting *houses*, and upon the bill being read, the word *house* was in the singular number, the variance was held fatal. *R. v. Spencer*, 1 R. & M. 98. An omission to charge in the bill of indictment, that the matter of traverse tried between the State of Tennessee and D., touching which the defendant gave his evidence, was by indictment or presentment, is fatal. *Steinson v. State*, 6 Yerg. 531. It is not necessary that it should appear whether the witness was compelled to attend court by subpoena, or whether he attended voluntarily; nor whether the false testimony was given in answer to a specific question put to him, or in the course of his own relation of facts; but it is sufficient if it be averred that an issue was duly joined in court, and came on to be tried in due course of law; and that the court had competent authority to administer the oath, without an express averment that the court had jurisdiction of the cause of action. *State v. Bishop*, 1 Chip. 120; *Com. v. Knight*, 12 Mass. 274. See Wh. Cr. L. 8th ed. §§ 1286 *et seq.* Under recent statutes defects of this class, when not substantial, may be either amended, or are cured by verdict.

At common law any essential variance in the statement of the circumstances attending the administering the oath is fatal (*Kerr v. People*, 42 Id. 307; *Hitesman v. State*, 48 Ind. 473; *State v. Street*, 1 Murph. 156; *Leach*, 150, 3d ed. 179; *State v. Hardwick*, 2 Mo. 185; 14 East, 218, n. a; and see 3 Stark. on Evid. 1136). The jurisdiction of the court must be distinctly averred and its title correctly given. Wh. Cr. L. 8th ed. § 1290, and cases there cited. Where the indictment alleged that the cause came on to be tried before Lloyd, Lord Kenyon, etc., William Jones being associated, etc., and from the judgment roll it appeared that Roger Kenyon was associated, etc., the variance was held fatal. *R. v. Eden*, 1 Esp. R. 97. Where in an indictment for perjury in an answer to a bill of chancery, the bill was described as exhibited against three persons only,

(d) *State v. Plummer*, 50 Maine, 267.

for having, on the twentieth day of July, in, etc., feloniously stolen, taken, and carried away nineteen dollars of the moneys

when in fact it was against four, it was held that this was no variance. *R. v. Powell*, 1 R. & M. 101. Where an indictment, in setting out the record of a conviction, stated an adjournment to have been made *by Const, Esq., and A., B., C., and D., and others their fellows, etc., justices*, and an examined copy of the record of conviction, when produced, stated the adjournment to have been made *by Const, Esq., and E., F., G., and others, etc.*, the variance was held fatal, unless the defect was supplied by evidence of an adjournment made by the persons stated in the indictment. *R. v. Bellamy*, 1 R. & M. 171. Where it becomes necessary, in charging the commission of the offence, to allege that a certain term of a county court was duly holden, it is not sufficient that it was holden by and before the chief judge of such court, without mention of any assistant judges. If either of the judges is named, it should appear that at least a quorum of the court held the term. *State v. Freeman*, 15 Vt. 723; see *Resp. v. Newell*, 3 Yeates, 407. Where the indictment alleged a bill of discovery filed in the Exchequer (in the answer to which perjury was assigned), to have been filed on a day specified, viz., first of December, 1807, and it appeared on the production of the bill to have been filed in the preceding Michaelmas term, according to the practice of the court, where a bill is filed in vacation, it was held that the variance was immaterial, the day not having been alleged as part of the document (1 Stark. R. 521); and where the perjury was assigned in answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the court, it was held to be no variance, the amended bill being part of the original bill. 3 Stark. on Evid. 1138. Where the bill was alleged to have been filed by Francis Cavendish Aberdeen, and others, and on the production of the bill it purported to have been filed by J. C. Aberdeen, and others, the variance was held to be immaterial, evidence being given that Francis Cavendish Aberdeen, and the other persons named, did in fact file the bill, although it was objected that it ought to have been averred in the indictment, that Francis Cavendish Aberdeen, etc., filed their bill by the name of J. C. Aberdeen, etc., and although, after setting out the material parts of the bill, the words were added, "*as appears by the said bill, filed of record.*" *R. v. Roper*, 1 Stark. 518; *R. v. Leefe*; 2 Campb. 139. In another case the indictment charged the alleged false evidence as given in the Palace Court, and described the court as "the Court of the King's Palace, at Westminster;" and it appeared from the record of the trial below, that it was called "the Court of the King's Palace of Westminster." This was held no variance. *R. v. Israel*, 3 D. & R. 234. So where it was averred that the cause in which the alleged perjury was committed "came on to be tried, and was then and there duly tried by a jury of the county," and the record of the trial stated that the jury came of the neighborhood of Westminster, it was held, that the cause was in fact so tried, and no county being mentioned in the record, it was no objection. *Ib.* It has been held, that though there be two counts in the original proceeding, yet an averment that an *issue* came on to be tried will be no variance. *R. v. Jones*, Peake's R. 37. See Wh. Cr. L. 8th ed. § 1287. Where perjury to a bill of equity is charged, it must appear that the bill was one which required verification by oath. *People v. Gaige*, 26 Mich. 30; see *Silver v. State*, 17 Oh. 365.

In an indictment for perjury in taking a false oath before a regimental court of inquiry, the indictment ought to be set forth of what number of officers the said court of inquiry consisted, and what was their respective rank, so as to enable the court to discern whether the said court of inquiry was constituted according to law. *Com. v. Conner*, 2 Va. Cases, 30. Where an indictment charged the defendant with perjury in "a matter of traverse then and there tried, between

of one J. E., and that at the said trial, so then and there had as aforesaid, J. S., late of laborer, appeared as a witness for and on behalf of the said G. B. upon the said trial, and was sworn and took his corporal oath before the said J. M. and J. V., justices as aforesaid, on the holy gospel of God, to speak the truth, the whole truth, and nothing but the truth, of, upon,

the state of Tennessee and D., for an assault and battery," it was held that this was not a sufficient charge of the jurisdiction of the court before which the case was tried. *Steinson v. State*, 6 Yerg. 531. Even if the plaintiff offer himself as a witness, is sworn, and testifies falsely, perjury may be assigned on the oath thus taken, though he was incompetent as a witness, provided the justice had jurisdiction of the subject matter. *Montgomery v. State*, Wilcox, 220. Where the defendant is indicted for perjury, committed on the trial of an issue in a former indictment, the indictment must set forth the finding of the former indictment in the proper court of the proper county, and should also set forth that indictment, or so much thereof as to show that it charged an offence in that county, and of which said court had cognizance, and also the traverse or plea of defendant in that indictment, whereon the issue was joined. Judgment on an indictment, defective in these particulars, must be arrested. *State v. Gallimore*, 2 Iredell, 374. On a conviction for perjury in Rutherford county, North Carolina, two reasons were assigned in arrest of judgment: 1st. That the indictment did not charge that the oath was taken in Rutherford county; 2d. Nor that the evidence was given to the court and jury, but to the jury only. The first reason was overruled, the indictment charging that "he, the said A. B., on the 16th of April, in the year aforesaid, in the county aforesaid, came before the said C. D., judge as aforesaid, and then and there, before the said C. D., did take his corporal oath." The part of the indictment immediately preceding stated that C. D. held the court as judge at that term in Rutherford county; the same county was inserted in the caption of the indictment, and there was none other mentioned in any part of it; the words "then and there," refer to the 16th of April and to the county of Rutherford. The second reason was overruled, as the indictment charged that the oath was taken before the judge, and the evidence was thereupon given to the jurors. This, it was held, was the proper way of stating the oath. *State v. Witherow*, 3 Murph. 153. Where the indictment alleged the false oath to have been taken *before* the board of inspectors, etc. (they being qualified to administer it), it is a sufficient averment of the fact that the oath was administered *by* the board. *Campbell v. People*, 8 Wend. 636. Where perjury was charged to have been committed in that which was in effect an affidavit on an interpleader rule, and the indictment set out the circumstances of the previous trial, the verdict, the judgment, the writ of *fieri facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the interpleader act; it was held, that the indictment was bad, as the affidavit did not appear to have been made in a judicial proceeding. *R. v. Bishop*, 1 C. & M. 302.

Under recent statutes in most jurisdictions, the detailed nature of the authority of the court need not be given. Wh. Cr. L. 8th ed. § 1288, and cases there cited.

But where the oath is taken before a special officer, and not before a court of record, the authority of the officer must be particularized. Wh. Cr. L. 8th ed. § 1289; *U. S. v. Wilcox*, 4 Blatch. C. C. 49. Regularity will be presumed if the foundations be laid by an accurate statement of jurisdiction. *R. v. Virrier*, 4 P. & D. 161, 12 Ad. & El. 317; *Walker v. R.*, 8 El. & Bl. 439; *Com. v. Hatfield*, 107 Mass. 227. See *R. v. Shaw*, L. & C. 579; 10 Cox C. C. 66.

and concerning the matter then depending,(e) (they the said J. M. and J. V., justices as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said J. S. in that behalf),(f) whereupon it then and there became a material inquiry on the trial of the said issue whether (*here state the several questions*);(g) and the said J. S., being

(e) It must appear that the defendant was *regularly sworn*. *State v. Divall*, 44 N. H. 140. "Duly sworn" is a sufficient averment. *R. v. McCarther*, Peake, 211; *Tuttle v. People*, 36 N. Y. 431; *Dodge v. State*, 4 Zab. 455; *State v. Farron*, 10 Rich. 165. In case of an affidavit the jurat need not be set out (9 East, 437), nor need the affidavit be stated, or proved to have been filed in, or exhibited to the court, or in any other manner used by the defendant or others. 7 T. R. 315. It is enough if it be stated that the defendant was *duly sworn*, though he took the oath according to the ceremonies of a particular religion. *R. v. McCarther*, Peake, N. P. 155; 12 Vin. Ab. T. 28; 2 Keb. 314; *Dodge v. State*, 4 Zab. 455; *State v. Farron*, 10 Rich. L. (S. C.) 165. And if he were sworn twice, first in the usual form, and afterwards after his own method, to state that he was sworn on the holy gospel of God will suffice, though had he been sworn only in the latter way the variance would have been fatal. *Ib.*; *Cro. C. C.* 7; *Ib.* 575, n. c. See *State v. Wisenhurst*, 2 Hawks, 458. An indictment for perjury, which avers that the defendant did "then and there, in due form of law, take his corporal oath," without stating that he was sworn on the gospels, or by uplifted hand, is sufficiently certain. *Res. v. Newell*, 3 Yeates, 407; see *State v. Freeman*, 15 Vt. 723; *Montgomery v. State*, Wilcox, 220; *State v. Gates*, 17 N. H. 373. See Wh. Cr. L. 8th ed. § 1287, and cases in note (b). As to variance in statement of oath, see *R. v. Southwood*, 1 F. & F. 356; *State v. Gates*, 17 N. H. 373.

The *time* of the oath must be correctly set forth. Wh. Cr. L. 8th ed. § 1291.

(f) This averment should always appear (Wh. Cr. L. 8th ed. § 1292; *Morell v. People*, 32 Ill. 499); and this by specific averment. *McGregor v. State*, 1 Carter (Ind.) 232. In an indictment for making a false affidavit, it is sufficient to state that defendant came before A. and took his corporal oath (A. having power to administer an oath), without setting out the nature of A.'s authority. *R. v. Callanan*, 6 B. & C. 102. See *State v. Ludlow*, 2 South. R. 772; *Campbell v. People*, 8 Wend. 638; *People v. Phelps*, 5 Wend. 10; *R. v. Howard*, M. & R. 187; *State v. Gallimore*, 2 Iredell, 372.

(g) Materiality must be averred or implied (Wh. Cr. L. 8th ed. § 1304; *R. v. Aylett*, 1 T. R. 69; *R. v. Dowlin*, 5 T. R. 318; *Comb.* 461; *Cro. Eliz.* 428; *Com. R.* 43; 8 Ves. 35; 2 *Bridgman's Index*, 395; 2 *Ld. Raym.* 889; *Holt*, 535; *Cro. C. C.* 7th ed. 613, n. a; *R. v. Tremearne*, 1 R. & M. 147; *R. v. McKernon*, 2 Russ. 541; *Campbell v. People*, 8 Wend. 636; *Hinch v. State*, 2 Mo. 8; *Weathers v. State*, 2 Blackf. 279; *Com. v. Knight*, 12 Mass. R. 274; *State v. Hayward*, 1 N. & M'C. 547; *State v. Hattaway*, 2 N. & M'C. 118; *State v. Dodd*, 2 Murph. 226; *R. v. Nicholl*, 1 B. & Ad. 21; 2 *Stark. Ev.* new ed. 626; *State v. Ammons*, 2 Murph. 123; *State v. Flagg*, 25 Ind. 243); though all the circumstances which make such materiality need not be stated (*State v. Mumford*, 1 Dev. 519; *State v. Sleeper*, 37 Vt. 122; *Com. v. Johns*, 6 Gray, 274), it being only necessary to say that they became and were so (*R. v. Dowlin*, 5 T. R. 318; see *Ld. Raym.* 889; *R. v. Gardiner*, 8 C. & P. 737; 2 *Moody C. C.* 95; *R. v. Scott*, 13 Cox C. C. 594), though it will be proper to state any circumstances to which the assignment of perjury must afterwards refer. *R. v. Aylett*, 1 T. R. 66. The express allegation of materiality may be properly omitted where the materiality of the question evidently appears on the record, as where the falsehood affects the actual issue of innocence or guilt, or where

so sworn as aforesaid, wickedly contriving and intending to cause the said G. B. unjustly to be acquitted of the said felony, did then and there knowingly,^(h) falsely,⁽ⁱ⁾ corruptly, wilfully,

the perjury is assigned in documents from the recital of which it is evident that the perjury was important. *U. S. v. McHenry*, 6 Blatch. 503; *Cambell v. People*, 8 Wend. 638, 639. See *Trem. P. C.* 139, etc., and 7 *T. R.* 315; 2 *Stark. C. L.* 423, n.; *Hendricks v. State*, 26 *Ind.* 493. Perjury may be assigned upon a man's testimony as to the credit of a witness. 2 *Stalk.* 514. So, every question in cross-examination which goes to the witness's credit is material for this purpose. *R. v. Overton*, 2 *Mood. C. C.* 263; *C. & M.* 655. Or he may be perjured in his answer to a bill in equity, though it be in matter not charged by the bill. 5 *Mood.* 348; *semble*, 1 *Sid.* 106, 274. See *R. v. Dunston*, *R. & M.* 109; *R. v. Yates*, *C. & M.* 132.

The averment of materiality does not avail when the record shows immateriality. *People v. Gaige*, 26 *Mich.* 30.

The averment of an indictment was that L. stood charged by P., before T. S., clerk, a justice of the peace, with having committed a trespass, by entering and being in the daytime on land in pursuit of game, on the 12th August, 1843; and that T. S. proceeded to the hearing of the charge; and that, upon the hearing of the charge, the defendant falsely swore that he did not see L. during the whole of the 12th August, meaning that he did not see L. at all on the 12th day of August, in the year aforesaid; and that, at the time he swore as aforesaid, it was material or necessary for T. S., so being such justice, to inquire of, and be informed by the defendant, whether he did see L. at all during the 12th day of August, in the year aforesaid. It was held that this averment of materiality was insufficient, because, consistently with this averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question and to have received this answer. *R. v. Bartholomew*, 1 *C. & K.* 366.

But an averment of materiality lets in evidence to prove materiality when not expressly contravening the record. *R. v. Bennett*, 2 *Den. C. C.* 241; 5 *Cox C. C.* 207; 3 *C. & K.* 124; *R. v. Schlesinger*, 10 *Q. B.* 670; 2 *Cox C. C.* 200; *Ryalls v. R.*, 11 *Q. B.* 781; 3 *Cox C. C.* 254.

(h) "Knowingly" is not essential when "falsely, wilfully, and corruptly" are used. *State v. Sleeper*, 37 *Vt.* 122.

(i) It must be charged that the defendant *falsely* swore, etc. (2 *M. & S.* 385); *R. v. Oxley*, 3 *C. & K.* 317; see *Wh. Cr. Pl. & Pr.* § 264), and if the same person swears contrary ways at different times, it is necessary to aver on which occasion he swore wilfully, falsely, or corruptly. *R. v. Harris*, 5 *B. & Ad.* 926; 1 *D. & R.* 578, *S. C.* The English cases tend to the doctrine that the word wilfully, etc., is not necessary, it being implied from the words, "falsely, maliciously, wickedly, and corruptly." *R. v. Cox*, 1 *Leach*, 71; see *R. v. Richards*, 7 *D. & R.* 665; *R. v. Stevens*, 5 *B. & C.* 246. But in this country an indictment charging that the defendant, "being a wicked and evil disposed person, and unlawfully and unjustly contriving, etc., deposed," etc., and concluding that the defendant "of his wicked and corrupt mind did commit wilful and corrupt perjury," is defective even at common law, for not alleging that the defendant wilfully and corruptly swore falsely. *State v. Carland*, 3 *Dev.* 114. In another case, however, an indictment which stated that the defendant "did voluntarily and of his own free will and accord, propose to purge himself upon oath of the said contempt," negating by express averments the truth of the oath, and concluding that the defendant "did knowingly, falsely, wickedly, maliciously, and corruptly commit wilful and corrupt perjury," was held good. *Res. v. Newell*, 3 *Yeates*, 407; see *Wh. Cr. L.* 8th ed. § 1286.

"Knowingly," "wilfully," "corruptly," and "falsely" cannot be safely

and wickedly say, (j) depose, and give in evidence, to the jurors of the jury then and there duly taken and sworn between the

omitted (*R. v. Stevens*, 5 B. & C. 246; *A. S. v. Babcock*, 4 McLean, 113; *Thomas v. Com.*, 2 Rob. (Va.) 795; *Cothran v. State*, 39 Miss. 541; *State v. Bobbitt*, 70 N. C. 81; *Juaracqui v. State*, 28 Tex. 625; *Allen v. State*, 42 Tex. 12), though "knowingly" may be dispensed with when "falsely, wilfully, and corruptly" are averred. *State v. Sleeper*, 37 Vt. 122. See on this topic *Wh. Cr. L.* 8th ed. §§ 1286 *et seq.*; *Wh. Cr. Pl. & Pr.* § 264.

(j) The usual method of introducing the alleged false evidence is, that the defendant did falsely swear or say, etc., as in the text (1 T. R. 64), or did swear "in substance and to the effect following" (*R. v. Leefe*, 2 Camp. 138; *Cro. C. C.* 7th ed. 573, n. a, and cases there cited); "or in manner and form following, that is to say," which allow of a greater latitude than "the tenor following," or words requiring a literal recital (*People v. Warner*, 5 Wend. 271; 1 Leach, 192; *Trem. P. C.* 139; 1 T. R. 64), and then stating the precise words, with innuendoes, or the substance of what was sworn to; a variance, however, in the latter case, which alters the sense, will be fatal. 1 Leach, 133. The same rigor as was noticed in another place (*Wh. Cr. L.* 8th ed. § 1297; *Wh. Cr. Pl. & Pr.* § 203; *Wh. Cr. Ev.* § 120, a) has not been required in this country, in the setting forth of the alleged false oath of the defendant, as, under the statute of Elizabeth, was considered essential in England. Thus, it is said, that at common law it is only necessary to set out the substance of the oath, and when that is done, an exact recital is not necessary; and accordingly where the article "an" was substituted for the article "the," the variance was held immaterial. *People v. Warner*, 5 Wend. 271; *State v. Ammons*, 3 Murph. 123. See on this topic generally *Wh. Cr. Pl. & Pr.* §§ 203, 273.

At common law, where the tenor of an affidavit is undertaken to be recited, and the recital is variant in a word or letter, thereby introducing a different word, it is fatal. *Wh. Cr. L.* 8th ed. § 1298. But where a statement of the substance and effect of an affidavit is sufficient, as is now generally the case in English and American practice, and only substance and effect are pretended to be given, evidence of the substance and effect is sufficient. *Ibid.*; *State v. Groves*, Busby, 402; *Taylor v. State*, 48 Ala. 157.

Where the charge was in swearing to an affidavit, "to the substance and effect following," a variance which consisted in using the words "suit" instead of "case," was deemed immaterial. *State v. Coffee*, N. C. Term R. 272; S. C., 2 Murph. 320.

As will presently be seen, if some of the words are proved, and these constitute an indictable offence, the allegations being divisible, this will sustain a verdict. *Wh. Cr. Pl. & Pr.* § 203; *infra*, p. 11.

Marcy, J., in *People v. Warner*, 5 Wend. 271, examines with great fairness the degree of particularity necessary in setting forth the words. "If the public prosecutor," he said, "was bound to set forth with literal and perfect accuracy, the objection was well taken. Even if he has needlessly undertaken to state it *in hac verba*, there are not wanting authorities, which declare that a failure in the slightest degree, in half a letter, to use a hyperbolical expression of Lord Mansfield, will be fatal.

"It was scarcely contended, on the argument, that it was absolutely necessary to set forth the oath in its exact words. The rule on this subject seems to be, that written instruments, where they form a part of the *gist* of the offence charged, must be set forth *verbatim*. In the case of forgery, the spurious instrument must be set forth in its very words and figures (*Arch. C. P.* 23; 1 East, 180; Leach, 721); but in perjury the rule is different. 'It is not necessary,' says Mr. Archbold, 'to set forth the affidavit, answer, etc., on which the perjury is assigned, *verbatim*; for the statute of 23 Geo. II. only requires the substance of the offence to be charged.' Our revised laws of 1813 contain a provision similar to the act

said state and the said G. B., before the said J. M. and J. V., justices as aforesaid, that he the said J. S. on the second day of

23 Geo. II., and if it applies to this case, it was not necessary to state in the indictment more than the substance of the oath. If the *revised statutes* are applicable to this case (and that they are is settled by this court in the case of *The People v. Phelps*, decided at the last term), then no defect or imperfection in matter of form, which does not tend to the prejudice of the defendant, can be alleged against the indictment. 2 R. S. 728, § 52. Whether we apply to this case the revised statute or the law as it stood previous to the last revision (and by one or the other it must be governed), it is quite evident that there was no necessity of setting forth the oath taken by the defendant with absolute accuracy; yet if the pleader has heedlessly undertaken to do so, it may be, he should be holden to a strict performance.

“The indictment alleges that the oath on which the perjury is assigned, *is in substance and to the effect following, to wit*, etc. Whether it was intended in this case to set forth the oath *verbatim*, depends upon the true definition of the word ‘*effect*.’ The word ‘*tenor*’ has a technical meaning and requires an exact copy; and the defendant’s counsel infers that because ‘*effect*’ is often used with it, a like meaning is to be put on that word. The inference does not strike me as conclusive or correct; because the *tenor* and *effect* require an exact copy, it is not to be inferred that *substance* and *effect* require as much. The ordinary meaning of the word ‘*effect*,’ as well as judicial decisions thereon, refute the interpretation which the defendant’s counsel has given to it. Where an instrument was alleged to be ‘*to the effect following*,’ a literal copy was not required. Arch. C. P. 68. Even the words ‘*in manner and form following*,’ do not require a perfect copy. *R. v. May*, 1 Dougl. 193. It is expressly said in *King v. Bear*, 2 Salk. 417, that the words *ad effectum sequentium* were loose and useless when joined to *juxta tenorem*. To my apprehension, the substance and effect of an instrument in writing cannot, either in common parlance or legal import, be understood to mean an exact copy of it. My conclusion is, that the law did not make it necessary, nor did the pleader attempt in this case to set forth the oath taken by the defendant literally, and that the variance between the oath produced in evidence and that set forth in the indictment, is wholly immaterial; all apprehensions therefore that the defendant, if sentenced and punished on this indictment, would be exposed to a second prosecution for the same offence, appear to me to be wholly imaginary; but if this application on his part should prevail, any further effort to bring him to punishment would probably be defeated by a plea of *autrefois acquit*.

“I am of opinion that the court below decided correctly in adjudging the variance to be immaterial, and that the exception to the decisions of that court is not well taken. The general sessions are therefore advised to render judgment upon the conviction.”

In a case decided in 1876, in Massachusetts, an indictment charging that the defendant swore that he had personal property in G., in the county of E., and commonwealth of Massachusetts, was held to be sustained by proof that he swore to a written statement that he had personal property at G., in the county of E., there being proof that the statement was meant for G. in the commonwealth of Massachusetts. *Com. v. Butland*, 119 Mass. 311; see *Com. v. Terry*, 114 Mass. 263. But a substantial variance is fatal. *Wh. Cr. Ev.* 120 a.

An indictment alleged that a cause was pending in a county court, and that at the hearing it became a material question whether the plaintiff in the cause had, in the presence of the prisoner, signed at the foot of a bill of account, purporting to be a bill of account between a firm called B. & Co. and W., a receipt for payment of the amount of the bill; and that the prisoner falsely swore that the plain-

K. races (meaning the of , in the year of our Lord one thousand seven hundred and seventy-five, being the second of three successive days on which certain horse-races were run at K., in the said county of Chester, in that year),(k) was in a certain booth at K. aforesaid, known by the sign of the Bull's Head, kept by one R. G., and that he the said J. E. came into the said booth and sat down by him (meaning himself the said J. S.), on the left hand side; and that he (meaning himself the said J. S.) asked the said J. E. if he (meaning the said J. E.) was not ill, and that he (meaning the said J. E.) said, I (meaning himself the said J. E.) am well enough, I (meaning himself the said J. E.) have been playing at cards with a parcel of men and have lost a great deal of money; and that he the said J. S. said, man (meaning the said J. E.), I (meaning himself the said J. S.) am very sorry for you (meaning the said J. E.); and that the said J. S. upon his oath aforesaid, before the said jury so taken between the said state and the said G. B., and the said J. M. and J. V., justices as aforesaid, did further say, depose, swear, and give in evidence, that the said J. E. then and there took him the said J. S. by the hand, and said, I (meaning himself the said J. E.) will never play at cards any more; whereas, in truth and in fact,(l) the said J. E. did not sit down by the said

tiff did, on a certain day, in the presence of the prisoner, sign the receipt (meaning a receipt at the foot of the first-mentioned bill of account) for the payment of the amount of the bill. The plaintiff in the county court had on other occasions signed similar receipts in the presence of the prisoner. It was ruled that the bill of account was stated and set forth in the indictment with sufficient certainty. *R. v. Webster, Bell, C. C. 154; 8 Cox, C. C. 187.*

(k) The office of an innuendo will be discussed more fully in the preliminary notes to the chapter on libel, and it will be shown that it is a mode of explaining some matter already expressed, and serves to point and elucidate precedent matter (*R. v. Taylor, 1 Camp. 404; R. v. Yates, 12 Cox, C. C. 233; R. v. Verrier, 4 P. & D. 161; 12 A. & E. 317*), though it can never introduce charges, or add to or vary the sense of those already made. 1 *Chit. C. L. 310; Stark. C. P. 126; R. v. Griepe, 1 Ld. Ray. 256.* It means nothing more than the words *id est, scilicet, aforesaid*, etc., being merely an explanation of what has gone before. *Ib.* Where, however, the innuendo and the matter it introduces, are altogether impertinent and immaterial, they may be rejected as superfluous. *R. v. Aylett, 1 T. R. 65; Roberts v. Camden, 9 East, 93.* But when an innuendo is necessary, its omission is fatal. *R. v. Yates, 12 Cox, C. C. 233.*

(l) The general averment that the defendant swore falsely, etc., upon the whole matter, will not be sufficient; the indictment must proceed by particular averments (or, as they are technically termed, by assignments of perjury), to negative that which is false. It is necessary that the indictment should expressly contradict the matter falsely sworn to by the defendant. Sometimes it is also necessary to set forth the whole matter to which the defendant swore, in

J. S. in the said booth on the twenty-sixth day of July, and whereas, in truth and in fact, the said J. S. did not ask the said J. E. whether he was well or not, and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he was well enough, and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he the said J. E. had been playing at cards with a parcel of men and had lost a great deal of money, and whereas, in truth and in fact, the said J. S. did not say to the said J. E. that he (meaning himself the said J. S.) was sorry for him (meaning the said J. E.), and whereas, in truth and in fact, the said J. E. did not say to the said J. S. that he would never play at cards any more, and whereas, in truth and in fact, the said J. E. had not, on the said day of any conversation whatsoever with the said J. S.; all which statements made by the said J. S. the said J. S. then and there well knew to be false,(m) and so the jurors aforesaid now here sworn upon

order to make the rest intelligible, though some of the circumstances had a real existence; but the word "falsely" does not import that the whole is false; and when the proper averments come to be made, it is not necessary to negative the whole, but only such parts as the prosecutor can falsify, admitting the truth of the rest. Wh. Cr. L. 8th ed. § 1300; R. v. Whitehouse, 3 Cox, C. C. 86. "The object of the *assignment of perjury* is to falsify, by averments in the indictment, those parts of the defendant's allegations on oath, in which it is intended to charge him on the trial with having committed the offence in question." 2 M. & S. 385 to 392. Where the party has sworn contrary ways at different times, it must be expressly shown in such case, which was the false oath. 5 B. & A. 922; 1 D. & R. 578, S. C. The assignments should be distinct, in order that the defendant may have notice of what he is to come prepared to defend; see *Ib.*; and it would, therefore, be insufficient to aver generally and indefinitely that the defendant's oath was false. In many instances, however, the indictment may not be vitiated by the assignment being rather more comprehensive than the term of the defendant's evidence. Thus if the defendant swore "that he never did, at any time during his transactions with the victualling office, charge more than the usual sum per quarter, beyond the price he actually paid for any grain purchased by him for the said commissioners as their corn factor," and this assertion be contradicted by an averment that "he did charge more than the usual sum per quarter for and in respect of such malt or grain," the indictment will not be vitiated by the introduction of the words "and in respect of." R. v. Atkinson, Cro. Circ. Assist. 437 to 451; Bac. Abr. Perjury, C.; 1 Saund. 249 a, note 1, S. C.

It is enough where there are several assignments of perjury in one count, to prove one of them, and though some be bad, judgment will be given on the sufficient assignments. 2 Ld. Raym. 886; 2 Camp. 138, 139; Cro. C. C. 7th ed. 622; R. v. Callahan, 6 B. & C. 102; State v. Hascall, 6 N. Hamp. R. 358; State v. Bishop, 1 Chip. 110; Com. v. Johns, 6 Gray, 274; see Wh. Cr. L. 8th ed. § 1302.

(m) State v. Wood, 17 Iowa, 18. In negating the defendant's oath, where he has sworn only to his belief, it is proper to aver that "*he well knew*" the contrary of what he swore. Thus, when the affidavit upon which the charge of

their oath aforesaid, do say, that the said J. S., at the said court of session and gaol delivery, etc., before the said J. M. and J. V., then being such justices as aforesaid (and then and there having sufficient and competent power and authority to administer the said oath to the said J. S.), did, in manner and form aforesaid, commit wilful and corrupt perjury,⁽ⁿ⁾ against, etc. (*Conclude as in book 1, chapter 3.*)

(578) *In swearing as to age in procuring money of the United States, in enlisting in the navy of the United States.*(o)

That late, etc., on, etc., at, etc., wishing and intending to procure the expenditure of public money of the United States of America, and representing himself to be a citizen of the United States of America, and to be of full age, to wit, of the age of twenty-one years and upwards, did then and there come in his own proper person before a in the navy of the United States of America, duly authorized and empowered to enlist persons in the naval service of the said United States, and did then and there apply to the said to enlist him the said as a in the naval service of the said United States, he the said then and there contriving and intending by means of such enlistment, so applied for by him as aforesaid, to procure and bring about the expenditure of public money of the

perjury is founded merely states the belief of the affiant that a larceny had been committed, the assignment of perjury must negative the words of the affidavit, and it is not sufficient to allege generally that the persons charged committed not the larceny; it is necessary, when the defendant only states his belief, to aver that the fact was otherwise, and that the defendant knew the contrary of what he swore. *State v. Lea*, 3 Alabama, 602. See Wh. Cr. Pl. & Pr. § 164. An indictment against an insolvent debtor for perjury in swearing to a schedule which did not discover certain debts owing to him, was held bad on a demurrer for not averring that he well knew and remembered that the omitted debts were then justly due and owing to him. *Com. v. Cook*, 1 Robin. Va. 729. But this averment is not necessary except where the perjury is assigned upon the defendant's statement of his belief or denial of his belief, in the alleged false matter. *State v. Raymond*, 20 Iowa, 582. See *State v. Lindenburg*, 13 Tex. 27. And it should be remembered that there are cases in which an allegation such as that in the text would be unsafe. Rash swearing without probable cause may be perjury; and, if so, it would be only necessary to aver that the swearing was rash and without probable cause. Wh. Cr. L. 8th ed. § 1246.

(n) The usual summing up of the indictment is, "that so the defendant did commit wilful and corrupt perjury;" but it seems that this allegation is immaterial, and may be rejected as surplusage. *Ryalls v. R.*, 11 Q. B. 781; *R. v. Hodgkins*, L. R. 1 C. C. 212.

(o) *U. S. v. O'Brien*, United States Circuit Court, New York, 1847.

said United States, and the payment of the sum of being the amount paid by the said United States to on their enlistment in the naval service of the said United States, as he the said then and there well knew and understood, and that it being then and there material that the said should know and be informed whether the said possessed the requisite qualifications for enlistment as aforesaid, and particularly whether or not the said was then and there a citizen of the United States of America, and was then and there of the full and lawful age of twenty-one years, he the said in pursuance of the regulations and requirements of the department of the navy of the said United States, required and directed the said to make oath and depose in writing in regard to the age and citizenship of him the said before a notary public (*or otherwise*), dwelling in said city of New York, and duly authorized and empowered to administer oaths in the said city of New York, and having competent power and authority to administer an oath in the premises to the said

And the jurors aforesaid, on their oaths aforesaid, do further say, that the said not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and intending to defraud the United States of America, did on the said day of in the year of our Lord one thousand eight hundred and in his own proper person, go before the said at the city of New York, in the southern district of New York aforesaid, he the said having then and there competent power and authority as aforesaid to administer an oath to the said in that behalf, and the said was then and there in due manner sworn by the said and took his oath before the said in due form of law, and did then and there falsely and corruptly say, depose, swear, and make affidavit in writing, amongst other things, in substance and to the effect following, that is to say, that he the said was born in and that he was a citizen of the said United States of America, and that he the said was of full age, to wit, of the age of twenty-one years and upwards, whereas in truth and in fact the said at the time he took his said oath and made his affidavit aforesaid, was not born in the state of

one of the United States of America, and was not a citizen of the said United States of America, but was, in truth and in fact, born in some place out of the said United States of America, to the jurors aforesaid unknown, and was not of full age, to wit, of the age of twenty-one years, but was in truth and in fact under full age, and under the age of twenty-one years.

And the jurors aforesaid, on their oath aforesaid, do say, that the said by means of the false oath aforesaid, then and there procured himself to be enlisted in the naval service of the said United States, and then and there procured and brought about the expenditure of public money of the United States of America, and procured the payment to himself, out of public money of the said United States, of the sum of and so the jurors aforesaid do say, that the said on the said day of in the year of our Lord one thousand eight hundred and at the city of New York, in the southern district of New York aforesaid, and within the jurisdiction of this court, before the said notary public (*or otherwise*) (he the said then and there having competent power and authority to administer the aforesaid oath), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely did swear touching the expenditure of public money of the said United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181 n., 239 n.*)

(579) *At custom-house, in swearing to an entry of invoice, intending to defraud the United States, etc., under act of March 1st, 1823.*(p)

That late, etc., on, etc., at, etc., wishing and intending to enter by invoice, at the custom-house in said city of New York, certain goods, wares, and merchandise, which before that time had been brought and imported in a certain called the whereof one then and there was master, from a foreign port or place, to wit, from the port of in the (*specify the place, whether kingdom or otherwise*), and which were subject to the payment of duties to the United States of America, on being so brought and imported, did come in his own proper per-

(p) *U. S. v. Froesch*, United States Circuit Court, New York. The defendant in this case forfeited his recognizance.

son, on, etc., at, etc., and did then and there produce and deliver to and before one a deputy collector of the customs of the port and district of the said city of New York, duly appointed according to law, a certain entry, purporting to be an entry of the merchandise so as aforesaid imported by the said from the said port of in the said which said entry, so produced and delivered as aforesaid, was duly signed and subscribed by him the said in his own proper handwriting, * and the said then and there was sworn, and took his corporal oath, before the said in due form of law, touching and concerning the matters contained in the said entry, † so as aforesaid produced and delivered by him the said to him the said then and there being a deputy collector of the customs as aforesaid, he the said then and there having sufficient and competent power and authority to administer the said oath to the said in that behalf, which said oath so taken by him the said was required to be taken by him the said under and by virtue of an act of congress of the United States of America, approved on the first day of March, in the year one thousand eight hundred and twenty-three, entitled “An act supplementary to, and to amend an act entitled ‘an act to regulate the collection of duties on imports and tonnage,’ passed on the second day of March, seventeen hundred and ninety-nine, and for other purposes,” in a matter and proceeding at the custom-house at the said port and district of the city of New York, on the said day of aforesaid, it then and there being material that a just and true account of all the goods, wares, and merchandise, so as aforesaid imported by him the said should be furnished to the officers of the customs in that behalf, at the custom-house in said city of New York, and should be set forth in said entry, so as aforesaid produced and delivered by the said to the said ††, and it being then and there material that the said officers of the customs, acting in that behalf, should know and be informed whether the said in the said entry had concealed or suppressed anything whereby the United States might be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise. And the jurors aforesaid, on their oath aforesaid, do further say, that the said then and there being so sworn as aforesaid, not having

the fear of God before his eyes, and being moved and seduced by the instigation of the devil, being so sworn as aforesaid, did then and there, upon his oath aforesaid, touching and concerning the matters contained in the said entry, knowingly and willingly swear falsely, amongst other things, and make oath in writing and substance, and to the effect following, that is to say, that the said entry, so then and there delivered by him to the collector of New York (meaning thereby the entry so as aforesaid produced and delivered by him the said to the said), contained a just and true account of all the goods, wares, and merchandise imported by or consigned to in the called the whereof was master, from (meaning thereby the goods, wares, and merchandise so as aforesaid imported by him the said in said and consigned to), and that he the said in the said entry or invoice, had not concealed or suppressed anything, whereby the United States of America might be defrauded of any part of the duty lawfully due on said goods, wares, and merchandise; whereas, in truth and in fact, the said entry did not contain a just and true account of all the goods, wares, and merchandise, imported by him the said or consigned to in the said called the whereof said was then and there master as aforesaid, but on the contrary thereof, the account of the goods, wares, and merchandise, contained in the said entry, was then and there false, in this, that in and by the said entry, the said goods, wares, and merchandise are and were set forth and represented to have cost the importer thereof, including charges, the sum of (*here insert the sum, in the currency of the country from whence the goods were exported*), meaning thereby so much money of the kingdom (*or otherwise*) of when, in truth and in fact, the said goods, wares, and merchandise, cost the importer thereof, including charges, a much greater and larger sum and price than the said sum of of the currency aforesaid; and whereas also, in truth and in fact, he the said in the said entry, had concealed and suppressed the true and actual cost and value of said goods, wares, and merchandise, with intent thereby to defraud the said United States of America of some part of the duty lawfully due and chargeable on said goods, wares, and merchandise, and whereby the said United States were defrauded

of a large part of the duty lawfully chargeable on said goods, wares, and merchandise. And so the jurors, etc., do say, that the said did on the said day of in the year, etc., in the matter and proceeding aforesaid, at the custom-house in the said city of New York, take the said oath before the said he the said then and there being a deputy collector of the customs as aforesaid, having competent authority to administer such oath to the said as aforesaid, when an oath was required to be taken under and by virtue of a law of the United States of America, and under and by virtue of the revenue laws of the said United States, and upon the taking of said oath, by him the said as aforesaid, he the said did then and there knowingly and willingly swear falsely, in manner and form aforesaid, in a matter and proceeding when the aforesaid oath was required, by a law of the United States of America, to be taken by the said and was then and there guilty of perjury, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

*Second count. Same as first down to *, at which insert :*

and that the said did also then and there, at the time of producing and delivering the said entry as aforesaid, produce and deliver to the said being then and there a deputy collector of the customs as aforesaid, duly appointed according to law, a certain invoice, purporting to be an invoice of the goods, wares, and merchandise so as aforesaid imported by the said in the said called the from the said port of and included in the entry then and there as aforesaid produced and delivered by the said to the said and the said was then and there in due manner sworn, and took his oath before the said in due form of law, touching and concerning the matters contained in the said entry and invoice, † (*here insert as much of first count as intervenes between † and ††*); and it being then and there also material, that a just and faithful account of the actual cost of the said goods, wares, and merchandise, of all charges thereon, including charges of purchasing, carriage, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback, or bounty, but such as had been actually allowed on the same, should be furnished to the officers of the customs, acting in that

behalf, at the custom-house in the said city of New York, and set forth in said invoice, so as aforesaid produced by him the said and it being also then and there material, that the officers of the customs acting in that behalf should know and be informed, whether he the said knew or believed in the existence of any invoice of the said goods, wares, and merchandise, other than the invoice so as aforesaid produced and delivered by him the said also whether or not, the invoice so then and there produced and delivered by him the said was then and there in the state in which he the said had actually received the same, and it being also then and there material, that the said officers of the customs, acting in that behalf, should then and there know and be informed, whether or not, he the said in the said entry, or the said invoice, had concealed or suppressed anything whereby the United States of America might be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; and that the said not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there being so sworn as aforesaid, did upon his oath, touching and concerning the matters contained in the said entry and invoice, knowingly and willingly(*q*) swear falsely, and make oath in writing, in substance and to the effect following, that is to say, that the entry then delivered by him to the collector of New York (meaning thereby the entry so as aforesaid produced and delivered by him the said to the said), contained a just and true account of all the goods, wares, and merchandise imported by or consigned to in the called the whereof was then and there master, from (meaning thereby the goods, wares, and merchandise so as aforesaid imported by him the said in said called the and consigned to), and that the said invoice, so then and there as aforesaid produced by him the said contained a just and faithful account of the actual cost of the said goods, wares, and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback, or

(*q*) "Knowingly and willingly" are terms used by the act of March 3, 1825.

bounty but such as had been actually allowed on the same, and also that he the said did not know or believe in the existence of any invoice, other than that so as aforesaid then and there produced by him the said and that the said invoice, so then and there produced and delivered, was in the state in which he the said had actually received the same, and also that he the said had not in the said entry or invoice concealed or suppressed anything, whereby the United States of America might be defrauded of any part of the duty lawfully due on the said goods, wares, and merchandise; whereas, in truth and in fact, the said entry so as aforesaid then and there produced and delivered, did not contain a just and true account of all the goods, wares, and merchandise imported by him the said or consigned to in the said called the whereof the said was then and there the master as aforesaid, but on the contrary thereof, the account of said goods, wares, and merchandise contained in the said entry was then and there false, in this, that in and by the said entry, the said goods, wares, and merchandise are, and were set forth and represented to have cost the importer thereof, including commissions and charges, the sum of (*here insert the sum, in the currency of the country from whence the goods were exported*), meaning thereby so much of the currency of the kingdom of (*or otherwise*), when, in truth and in fact, the said goods, wares, and merchandise cost the importer thereof, including commissions and charges, a much larger sum and price than the said sum of of the currency aforesaid, and whereas also, in truth and in fact, the said invoice, so then and there as aforesaid produced to the said did not contain a just and faithful account of the actual cost of the said goods, wares, and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback, or bounty but such as had been actually allowed on the same, but on the contrary thereof, the account of the actual cost of the said goods, wares, and merchandise, of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback, or bounty but such as had been actually

allowed on the same, was set forth and represented in the said invoice, to be the sum of (meaning thereby so much currency of the of), when, in truth and in fact, the actual cost of the said goods, wares, and merchandise, and of all charges thereon, including charges of purchasing, carriages, bleaching, dyeing, dressing, finishing, putting up and packing, and no other discount, drawback, or bounty but such as had been actually allowed on the same, was a different and much larger sum than the said sum of of the currency aforesaid, so contained in the said invoice. And whereas also, in truth and in fact, he the said then and there well knew and believed in the existence of an invoice of said goods, wares, and merchandise, other and greatly different from the said invoice so as aforesaid then and there produced by him the said in which said other invoice, the said goods, wares, and merchandise were set forth and represented to have cost a much larger sum and price than was expressed in the said invoice so as aforesaid then and there produced and delivered by him the said to the said and whereas also, in truth and in fact, the said invoice so then and there produced as aforesaid, was not then and there in the state in which the same had been actually received by him the said but on the contrary thereof, the said invoice so then and there produced as aforesaid, had, after the receipt of the paper on which the said invoice was written, been greatly and materially altered and written upon by him the said and whereas also, in truth and in fact, he the said in the said entry and invoice, had concealed and suppressed the true and actual cost and value of the said goods, wares, and merchandise, with intent thereby to defraud the United States of America of some part of the duties lawfully due on the said goods, wares, and merchandise. And so the jurors aforesaid, on their oath aforesaid, do say, that the said on the said day of in the year, etc., before a deputy collector of the customs, at the said port and district of the city of New York, duly appointed according to law, he the said having as aforesaid competent power and authority to administer said oath to the said did upon taking the said oath in a matter and proceeding at the custom-house, in the said city of New York, when an oath was required to be taken under and by

virtue of a law of the United States of America, knowingly and willingly swear falsely, in manner and form last aforesaid, and did then and there commit wilful and corrupt perjury, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Last count.

And the jurors aforesaid, on their oath aforesaid, do further present that the southern district of New York, in the second circuit, is the district and circuit in which the said offences were committed, and in which the said was first apprehended for the said offences (*or as the case may be ; see ante, 17, 18, 181 n., 239 n.*).

(580) *In justifying to bail for a party after indictment found,
etc.(r)*

That heretofore, to wit, on, etc., one (the person bailed) was duly committed for trial to a prison in the city of in the southern district of New York aforesaid, for a certain felony (*or otherwise*), by him the said before that time alleged to have been committed against the said United States.

And the jurors aforesaid, on their oath aforesaid, do further present, that at an additional session (*or otherwise*) of the district court of the United States of America, for the southern district of New York, begun and held at the city of New York, within and for the district aforesaid, on, etc., the grand inquest of the United States of America, within and for the district aforesaid, found a true bill of indictment against the said (the first mentioned party), for having, on, etc. (*state particularly the offence or offences*).

And the jurors aforesaid, on their oath aforesaid, do further present, that the said was duly arraigned before the said district court, and that he pleaded not guilty to the said bill of indictment so found as aforesaid.

And the jurors aforesaid, on their oath aforesaid, do further present, that on application of the said the said district court did thereupon order the said to find sufficient bail in the sum of dollars, with or more sureties for his

(r) This form was prepared in the office of Mr. B. F. Butler, United States district attorney for New York ; afterwards attorney-general of the United States.

appearance in the said district court, to answer to the said indictment, and that in default of finding such bail the said should stand committed for trial upon said indictment.

And the jurors aforesaid, on their oath aforesaid, do further present, that after the making of the order last aforesaid, the said district court was adjourned until the of in the year of our Lord one thousand eight hundred and then to be holden at the said city of New York, in and for the said southern district of New York.

And the jurors aforesaid, on their oath aforesaid, do further present, that after the adjournment of the said district court as last aforesaid, one of the in the district aforesaid, on, etc., came before and then and there offered himself to be and become one of the bail for the said (he the said then and there being one of the commissioners duly appointed by the circuit court of the United States of America for the southern district of New York, to take acknowledgments of bail and affidavits, and also to take depositions of witnesses in civil causes depending in the courts of the United States, pursuant to the provisions of the act of congress in that behalf), that he the said should personally appear in the said district court of the United States, on the said of in the year of our Lord one thousand eight hundred and at o'clock in the forenoon of that day, then and there to answer all such matters and things as should be objected against him the said and not depart the said court without leave, and thereupon the said was then and there, at the said city of New York, on the said day of in due manner sworn by the said † and did make affidavit in writing, and take his corporal oath upon the holy gospel of God, before the said (the commissioner), touching and concerning the matters contained in his said affidavit (he the said then and there having sufficient and competent authority to administer an oath to the said on that behalf); and the said being so sworn as aforesaid, then and there, on, etc., at, etc., to prevent the said from knowing the true circumstances and property of him the said did, upon his corporal oath concerning the matters contained in the said affidavit, in writing, before the said (he the said then

and there having sufficient and competent authority to administer an oath to the said on that behalf), then and there wilfully, corruptly, and knowingly, by his own act and consent, commit perjury upon his oath aforesaid, in swearing to the said affidavit in writing (amongst other things), in substance and to the effect following, that is to say, that he the said (at the time of taking the said oath and making the said affidavit in writing meaning), was worth the sum of dollars, over and above all his the said just debts and liabilities. Whereas, in truth and in fact, at the time of taking the said oath and making the said affidavit in writing, he the said was not worth the sum of dollars over and above all his the said just debts and liabilities.

And the jurors aforesaid, on their oath aforesaid, do further present, that it then and there became necessary and material that the said (the commissioner) should know whether the said was, at the time of taking the said oath and making the said affidavit in writing, worth the sum of dollars, over and above all his the said just debts and liabilities.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said on, etc., before the said (he the said then and there having such sufficient and competent authority as aforesaid), †† upon his oath aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in a matter depending in the said district court of the United States, did wilfully and corruptly commit perjury, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said heretofore, on, etc., at, etc., came before (the commissioner), and then and there offered himself to be and become one of the bail for one he the said then and there being in prison in in the southern district of New York aforesaid, charged with a crime before that time committed against the United States of America, by him the said (the party bailed), in (*state the offence or offences with which he stood charged*), (he the said (the commissioner), then and there having competent authority from the said circuit court of the United States to take bail in that behalf), that the

said (the party bailed) should personally appear in the said district court of the United States, on, etc., at o'clock in the forenoon of that day, and then and there answer all such matters and things as should be objected against him the said and not depart the said court without leave, and thereupon the said (the bail) was then and there on the said day of at the said city of New York, in due manner sworn by the said * to make true answer to all such questions as should be demanded of him the said touching the sufficiency as bail for the said (he the said having then and there sufficient and competent authority to administer such oath to the said).

And the jurors aforesaid, on their oath aforesaid, do further present, that the said so being sworn as aforesaid, then and there, to wit, on, etc., at, etc., before the said was interrogated concerning the circumstances and property of him the said and thereupon he the said not having the fear of God before his eyes, etc., and to prevent the said from knowing the true circumstances and property of him the said on the said, etc., at, etc., wilfully, corruptly, knowingly, and willingly, by his own act and consent upon his corporal oath, did swear falsely, and make affidavit in writing before the said (he the said then and there having sufficient and competent authority to administer such oath to the said) in a proceeding where an oath was required to be taken by him the said under the laws of the United States (amongst other things), in substance and to the effect following, that is to say, that he the said (at the time of taking the said oath and making the said affidavit meaning), was worth the sum of dollars, over and above all his (the said meaning) just debts and liabilities; whereas, in truth and in fact, at the time of taking the said oath and making the said affidavit in writing, he the said was not worth the sum of dollars over and above all his (the said meaning) just debts and liabilities.

And the jurors aforesaid, on their oath aforesaid, do further present, that it then and there became necessary and material that the said should know whether the said was, at the time of taking the said oath and making the said affidavit

in writing, worth the sum of dollars over and above all his the said just debts and liabilities.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said on, etc., at, etc., before the said (he the said then and there having sufficient and competent authority to administer such oath to the said), upon his oath aforesaid, wilfully, corruptly, knowingly, and willingly, did make affidavit in writing, and swear falsely in regard to material facts in a proceeding before the said wherein an oath was required to be taken by him the said under the laws of the United States, and did commit wilful and corrupt perjury, against, etc. (*Conclude as in book 1, chapter 3.*)

*Third count. Same as second count down to *, then proceed to introduce so much of first count as is contained between † and ††, and conclude :*

upon his oath aforesaid, knowingly and willingly did make affidavit in writing, and swear falsely in regard to material facts in a proceeding before the said where an oath was required to be taken by him the said under the laws of the United States, and did commit wilful and corrupt perjury, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

That the said wickedly and corruptly intending to prevent the due course of justice, on, etc., at, etc., in his own proper person came before a commissioner of the circuit and district courts of the United States of America for the southern district of New York, duly appointed according to law, and having competent power and authority to administer oaths and take the recognizance of bail in criminal cases pending in the said courts, except in cases where the punishment is death, and then and there before the said offered to be and become one of the bail for the appearance in the said district court of one against whom an indictment for (*state the offence for which he stood charged*), was then and there pending in the said district court of the United States, on which said indictment he the said stood committed and charged, and upon which said indictment the said district court had, before the said

day of, etc., made an order that the said might be admitted to bail in the sum of dollars, with or more sureties; and so being there on the said day of in the year last aforesaid, before the said commissioner as aforesaid, and offering to be and become one of the bail of the said it was, and became then and there material that the said commissioner as aforesaid, should know and be informed whether he the said was worth the sum of dollars, over and above all his just debts and liabilities, and that thereupon, then and there, he the said was in due manner sworn, and did take his corporal oath on the holy gospel of God, before the said (he the said then and there having a competent authority to administer an oath to said in that behalf), touching his sufficiency as one of the bail of said and being so sworn, he the said not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, did wilfully, corruptly, and falsely swear and make his ** affidavit in writing (amongst other things), in substance and to the effect following, that is to say, that he (the said meaning) was worth the sum of dollars, over and above all his the said just debts and liabilities, whereas, in truth and in fact, he the said at the time he so swore and made the said affidavit, was not worth the sum of dollars, over and above his the said just debts and liabilities, and whereas, in truth and in fact, he the said at the time he so swore and made the said affidavit, was not worth any sum of money whatever (*or as the case may be*), over and above his just debts and liabilities.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said, etc. (*Conclude as before.*)

*Fifth count. Same as fourth count down to **, and then proceed :*
 † deposition in writing pursuant to the laws of the United States of America (amongst other things), in substance and to the effect following, that is to say, that he (the said meaning) was worth the sum of dollars, over and above all his (the said meaning) just debts and liabilities, whereas, in truth and in fact, he the said at the time he so swore and made the said deposition in writing, was not worth the sum of dollars,

over and above all his the said just debts and liabilities, and whereas, in truth and in fact, he the said at the time he so swore and made his said deposition in writing, was not worth any sum of money whatever (*if such is the case*), over and above his just debts and liabilities.

And the jurors aforesaid, on their oath aforesaid, do say, that, etc., on, etc., before the said so as aforesaid having a competent authority to administer the said oath to the said did wilfully and corruptly commit perjury in manner and form last aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

And the jurors aforesaid, on their oath aforesaid, do further present, that the southern district of New York is the district in which the said offence was committed, and in which the said was first apprehended for the said offence. (*See 17, 18, 181 n., 232 n.*)

(580a) *Another form for same (in substance).*

That at, etc., on, etc., M. R. was brought before the, etc., court of, etc., on a complaint for larceny, and ordered to recognize with sufficient sureties for her appearance to answer thereto, and failing so to recognize was committed to jail; that afterwards, on the same day, "at, etc., before J. G. L., the said L. being then and there a commissioner within and for said county, etc., legally authorized and duly qualified to take bail in criminal cases in said county," this defendant, W. C., "offered himself as bail and surety for the aforesaid M. R.; that the said C. was then and there lawfully required by said commissioner, pursuant to the course and practice of taking and approving bail, to make a written statement of his, said C.'s, circumstances and property, the same being material to aid said commissioner in determining whether he would and should take and approve said C. as such bail and surety; and that said C. did then and there, in pursuance of said requirement, make said written statement, and being then and there duly sworn did then and there falsely, knowingly, and corruptly depose and swear in and by said written statement as follows, that is to say: 'I, W. C., of (etc.), swear and say, that I (meaning said C.) am the owner of two dwelling-houses and land in (etc.), and they

(meaning said dwelling-houses and land) are worth not less than ten thousand dollars; and I (meaning said C.) am also the owner of two dwelling-houses and the land in' (etc.); whereas, in truth and in fact, the said W. C. was not then and there the owner of any house or houses in, etc., and was not then and there the owner of any house or houses, or of any land in, etc., as the said C., at the time he so deposed and swore as aforesaid, then and there well knew," whereby he did wilfully and knowingly commit wicked and wilful perjury, against, etc.(s) (*Conclude as in book 1, chapter 3.*)

(580b) *Another form for same.*

The jurors for, etc., on their oath present, that on, etc., at, etc., one J. B. was lawfully apprehended and arrested upon the charge and offence of being a common night-walker, theretofore and then committed by her, said B., in said, etc., and in a convenient place, to wit, the station house, situated, etc., duly and legally kept in custody upon the charge aforesaid; that on, etc., and while said B. was held in custody in said station-house upon the charge aforesaid, said B. made due application to C. A. B., bail commissioner within and for said county, legally authorized and duly qualified to take bail in criminal cases in said county, to be admitted to bail; that upon due hearing and examination it then and there appeared to said C. A. B., as such commissioner, that the M. court of, etc., had jurisdiction of the charge and offence upon which said B. had been so arrested and apprehended as aforesaid, and of the person of said B.; and said B. was lawfully ordered by said C. A. B., as such commissioner, to recognize with surety in the sum of two hundred dollars, personally to appear before the, etc., court of, etc., then next to be holden, etc., for the transaction of criminal business, on, etc., there to answer to the charge aforesaid, and also in like manner personally to appear at any subsequent time or term of said court, to which the consideration of said charge might by said

(s) It was held that this indictment sufficiently charged the substantive facts that constitute perjury, and that there was no variance if the original of the statement offered in proof on the trial bears his signature; nor was it material whether he had other property, or whether he was accepted as bail. *Com. v. Caul*, 105 Mass. 582.

court be continued, if not previously surrendered or discharged ; and so from time to time and term to term until the final decree, sentence, or order of said court thereon, and to abide such final decree, sentence, or order of said court thereon, and not to depart without leave ; that thereafter, to wit, on, etc., and before the expiration of twenty-four hours from the time when said B. was so arrested upon the charge and offence as aforesaid, at, etc., before said C. A. B., commissioner as aforesaid within and for said county of, etc., legally authorized and duly qualified to take bail in criminal cases in said county, one J. L. S. of, etc., offered himself as bail and surety for said B., as required by said order ; that said S. was then and there lawfully required by said commissioner pursuant to the course and practice of taking and approving bail, to make a written statement under oath of his, said S.'s, circumstances and property, the same being material to aid said commissioner in determining whether he would and should take and approve said S. as such bail and surety ; that said S., being then and there duly sworn by said commissioner to the requirement aforesaid, did then and there, in pursuance of said requirement, make said statement, and did then and there, being so sworn as aforesaid, falsely, wilfully, knowingly, and corruptly say, depose, and swear, in and by said written statement, as follows, that is to say : " Commonwealth of Massachusetts, Suffolk, ss. Before C. A. B., commissioner to take bail in criminal cases in said county, I, J. L. S. of, etc., offer myself as surety in the sum of two hundred dollars for J. B. And I on oath depose and say, that I am more than twenty one years of age ; that I reside in C., in, etc., that my residence is situated on, etc., and is numbered, etc., on said street, and that I have personal estate in said C., that its value is not less than two thousand dollars, that it consists of five horses and divers carriages and harnesses, three of said horses being kept by me in a stable adjoining my said residence, etc., and two of said horses being kept at a stable in, etc., all in said C., and that it is subject to no incumbrance, and that the amount of my debts and liabilities of every kind, absolute and conditional, does not exceed one hundred dollars, and that there are no unsatisfied judgments or executions standing against me, and that I am under no recognizance ; that my credit is good, and that I am worth in good

property, not less than two thousand dollars over and above all debts, liabilities, and lawful claims against me, and all liens, incumbrances and lawful claims upon my property, J. L. S.” Whereas, in truth and in fact, said S. did not then have personal estate in said C. of the value of not less than two thousand dollars, consisting of five horses and divers carriages and harnesses, and did not then and there own three horses, then being kept by him in a stable adjoining said residence, and did not then keep any horse in a stable adjoining said residence, and did not then keep or own any horses in any stable on, etc., in said C., and was not worth in good property not less than two thousand dollars; all of which he, said S., at the time when he so deposed and swore as aforesaid, then and there well knew. And so the jurors aforesaid, on their oath aforesaid, do present and say, that said J. L. S., on, etc., before said C. A. B., then and there having such power and authority as aforesaid, in manner and form aforesaid, did knowingly and wilfully commit wicked and wilful perjury; against the peace, etc.(t) (*Conclude as in book 1, chapter 3.*)

(581) *In giving evidence on the trial of an issue on an indictment for perjury.*(u)

That at the supreme judicial court of the said commonwealth, begun and holden at B., within and for the county of S., on the first Tuesday of November, on, etc., before I. P., Esq., then chief justice of the said court, a certain issue, in due manner joined in the said court, between the commonwealth aforesaid and one C. D., upon a certain indictment then depending against the said C. D., for wilful and corrupt perjury, came on to be tried, and was then and there, in due form of law, tried by a certain jury of the country, in due manner returned, empanelled, and sworn for that purpose; and that at and upon the trial of said issue, E. F., late of B., in the county aforesaid, laborer, did then and there appear, and was produced as a witness for and on behalf of the said commonwealth, and against the said C. D., upon the trial of the said issue, and the said E. F. was then and there duly sworn, as such witness as aforesaid, before the said I.

(t) This indictment was sustained in *Com. v. Sargent*, 129 Mass. 115.

(u) Altered by Mr. Davis, *Precedents*, 210. from 2 Chit. C. L. 452, 453, note n; 4 Went. 275, and 6 Went. 396.

P., Esq., then chief justice as aforesaid, that the evidence which he should give to the court and jury, between the said commonwealth and the said C. D., the defendant, on the issue then depending, should be the truth, the whole truth, and nothing but the truth (the said I. P., Esq., as the said chief justice of said court, then and there having sufficient and competent power and authority to administer the said oath to the said E. F. in that behalf); and the said E. F. being so sworn as aforesaid, it then and there, upon the trial of the said issue, became and was a material inquiry, whether (*here state the several material questions*). And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., maliciously and corruptly intending to injure and aggrieve the said C. D., and to cause and procure him to be convicted of the wilful and corrupt perjury whereof he then stood indicted as aforesaid, and to subject him to the pains, penalties, and punishments of the laws of this commonwealth inflicted on persons convicted of that crime, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, then and there on the trial aforesaid of the said issue, upon his oath aforesaid, before the said I. P., Esq., chief justice as aforesaid, having such competent authority to administer such oath as aforesaid, falsely, wickedly, knowingly, wilfully, and corruptly did say, depose, swear, and give evidence, to the said court and jury, amongst other things, in substance and to the effect following, that is to say (*here set out the evidence*); whereas, in truth and in fact, the said C. D. did not (*here assign the perjury, by negating the false evidence given by the witness*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F. falsely, wickedly, wilfully and corruptly, by his own voluntary act and consent, and of his own wicked mind and disposition, did then and there, in manner and form aforesaid, commit wilful and corrupt perjury; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(582) *On a trial in the Supreme Judicial Court of Massachusetts, on a civil action.*(v)

That heretofore, to wit, at the supreme judicial court, begun and holden at B., within and for the said county of S., on, etc.,

before I. P., then being chief justice of the same court, a certain issue duly joined in the said court, between one C. D. and one E. F., in a certain plea of trespass, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, duly summoned, empanelled, and sworn between the parties aforesaid; and that, upon the said trial, G. H., of said B., yeoman, appeared as a witness on the behalf of the said E. F., the defendant, and was duly sworn, and took his oath before the said I. P., chief justice as aforesaid, to speak the truth, the whole truth, and nothing but the truth, touching the matters in issue on the said trial; he the said I. P., chief justice as aforesaid, having sufficient and competent power and authority to administer the said oath to the said G. H. in that behalf; and that at and upon the said trial, certain questions became and were material, in substance as follows, that is to say (*here state the material questions*), and that the said G. H., being so sworn as aforesaid, and being then and there lawfully required to depose the truth in a proceeding in a course of justice, at and upon the said trial at the court aforesaid, then and there falsely, wilfully, voluntarily, and corruptly did say, depose, and swear, among other things, in substance and to the effect following, that is to say (*here state the evidence with proper innuendoes*); whereas, in truth and in fact (*here assign the perjury by negating the evidence*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H., in manner and form aforesaid, did commit wilful and corrupt perjury; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(582a) *Perjury committed at trial, English form.*(w)

That heretofore, to-wit, on, etc., a certain action of debt for a certain debt and demand was depending in the court of our said lady the queen, before her justices at Durham, that is to say, in our said lady the queen's court of pleas at Durham, wherein one J. N. was plaintiff, and one F. S. was defendant, and wherein the sum of money sought to be recovered, and indorsed on the writ of summons, did not exceed twenty pounds; and that heretofore, to wit, on, etc., at, etc., before E. S., Esq., then and

(w) R. v. Dunn, 1 C. & K. 730. The defendant was convicted and sentenced.

still being sheriff of the said county of Durham, a certain issue before then joined between the said J. N. and F. S., in the said action, came on to be tried in due form of law, and according to the form of the statute in such case made and provided, and was then and there, by virtue and in pursuance of a writ of our said lady the queen, directed to the said sheriff of the said county of Durham in that behalf, in due form of law, and according to the form of the statute in such case made and provided, duly tried before the said E. S., Esq., so then being such sheriff as aforesaid, and by a jury of the said county of Durham, in that behalf duly summoned, taken, and sworn between the parties aforesaid.

And that upon the said trial of the said issue one W. D., late of the parish of St. Aswald, in the said county of Durham, laborer, then and there appeared and was produced as a witness for and on behalf of the said F. S., and was then and there duly sworn and took his corporal oath upon the holy gospel of God, before the said E. S., so then and there being such sheriff as aforesaid, that the evidence which he, the said W. D., should give to the said sheriff and to the said jury, so sworn as aforesaid, touching the matter in question between the said parties, should be the truth, the whole truth, and nothing but the truth (he the said E. S., so then and there being such sheriff as aforesaid, and then and there having sufficient and competent authority to administer the said oath to the said W. D. in that behalf); and that at and upon the said trial of the said issue so joined between the said parties as aforesaid, to wit, on the day and year first aforesaid, at the parish aforesaid, in the county aforesaid, it then and there became and was a material question, whether the said F. S. had paid to the said J. N. divers or any sums or sum of money, in the whole amounting to a large sum of money, to wit, the sum of nine pounds eighteen shillings and sixpence, in full satisfaction of a certain sum of money, to wit, the sum of nine pounds eighteen shillings and sixpence, theretofore due and owing from the said F. S. to the said J. N., and also whether the said F. S. had paid or delivered to the said J. N. any sum or sums of money, or any promissory note or promissory notes, in payment or satisfaction, or in part payment or satisfaction, of a certain sum of money, to wit, the sum of nine

pounds eighteen shillings and six pence, theretofore due and owing from the said F. S. to the said J. N.

And that the said W. D., having been sworn as aforesaid, not having the fear of God before his eyes, not regarding the laws of this realm, but being moved and seduced by the instigation of the devil, and contriving and intending to prevent the due course of law and justice, and unjustly to aggrieve the said J. N., the said plaintiff in the said action, and to deprive him of the benefit of the said suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there, on the said trial of the said issue, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said jurors, so sworn to try the said issue as aforesaid, and before the said E. S., Esq., so then and there being such sheriff as aforesaid, did depose and swear (amongst other things) in substance and to the effect following, that is to say:—

“I saw S.’s wife bring out some money and give it to her husband (thereby meaning that the said W. D. had seen the wife of the said F. S. bring out some money and give it to the said F. S., her husband); S. took the five pound note and laid it on the table (thereby meaning that the said F. S. took a promissory note for the payment of five pounds, and laid it on a table), shoved it along (thereby meaning that the said F. S. shoved a promissory note for the payment of five pounds along a certain table to the said J. N.), and said to N. (thereby meaning that the said F. S. said to the said J. N.), ‘Look at that’ (meaning such promissory note as aforesaid), and also five sovereigns (thereby meaning that the said F. S. had also shoved along the said table to the said J. N. five pieces of the current coin of the realm called sovereigns, of the value of one pound each); and the said J. N. returned five shillings for the good of the company.

“It would be near eleven o’clock on the Friday when we went into S.’s house. This was the week before Blanchland Fair (thereby meaning a fair holden at Blanchland on the twenty-fourth day of August, in the year eighteen hundred and forty-two.)” He the said W. D., by so deposing and swearing in manner aforesaid, then and there meaning that the said F. S. had given and delivered and paid to the said J. N. a promissory note for the payment of five pounds, and five pieces of the said

current coin called sovereigns, as and for a payment in money, and in payment, satisfaction, and discharge of the said sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid; and that the said F. S. had offered and delivered and paid to the said J. N. a promissory note for the payment of five pounds, and five pieces of the said current coin called sovereigns, as and for a payment in money; and so that, by means thereof, and by the acceptance by the said J. N. of such note and five pieces of the said current coin called sovereigns, and of a competent part thereof in value, to wit, nine pounds eighteen shillings and sixpence, part thereof, as and for a payment in money, and in payment, satisfaction, and discharge of the said sum of money so heretofore due and owing from the said F. S. to the said J. N. as aforesaid, the said sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid might and would be paid, satisfied, and discharged.

Whereas, in truth and in fact, the said F. S. did not, on the Friday in the week before the said Blanchland Fair was so holden as aforesaid, shove a promissory note for the payment of five pounds along a table to the said J. N.; and whereas, in truth and in fact, the said F. S. did not then, on the said Friday in the said week before the said Blanchland Fair was so holden as aforesaid, say to the said J. N., "Look at that;" and whereas, in truth and in fact, the said F. S. did not, on the said Friday in the said week before the said Blanchland Fair was so holden as aforesaid, shove along a table to the said J. N. five pieces of the said current coin called sovereigns; and whereas, in truth and in fact, the said F. S. did not give or deliver, or pay then, or at any other time, to the said J. N. a promissory note for the payment of five pounds, and five pieces of the said current coin called sovereigns, as and for a payment in money, or otherwise in payment or satisfaction or discharge of the said sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid; and whereas, in truth and in fact, the said F. S. did not then, or at any other time, offer or deliver or pay to the said J. N. a promissory note for the payment of five pounds, and five pieces of the said current coin called sovereigns, as or for a payment in money, or any other promissory note or notes, or the sum of nine pounds eighteen shillings and sixpence, or any other

moneys; so that by means thereof, or by acceptance by the said J. N. of such promissory note, and five pieces of current coin called sovereigns, or of any part thereof, as or for a payment in money or otherwise, or of any such other promissory note or notes or moneys, or any part or parts thereof, in payment, satisfaction, or discharge of the said sum of money so theretofore due and owing from the said F. S. to the said J. N. as aforesaid, or any part thereof, the same sum of money so due and owing from the said F. S. to the said J. N. as aforesaid, or any part thereof, might or could or would be paid or satisfied or discharged. And so the jurors aforesaid do say, that the said W. D., on, etc., at, etc., before the said E. S., Esq. (so then and there being such sheriff as aforesaid, and then and there having such power and authority as aforesaid), by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, knowingly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our lady the queen and her laws, to the evil example, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(582b) *Another form for same.*

C. C. Court, to wit: The jurors for, etc., upon their oath present, that heretofore an action was brought in the chancery division of the high court of justice, in which J. S. S. was the plaintiff, and W. W., J. W., and others were defendants; and the said action came on for hearing upon, etc., before the Hon. J. B. K., one of the vice-chancellors of the chancery division of, etc., at his court at, etc.; and that the said J. S. S. did upon, etc., aforesaid, appear as a witness upon the hearing of such action, and was duly sworn to give true evidence therein; and the said J. S. S. did then, upon his oath, so taken as aforesaid, falsely, corruptly, knowingly, maliciously, and wilfully depose and swear, amongst other things, in substance and to the effect following, that is to say: that he, the said J. S. S., never did in any way employ or consult as his solicitors Messrs. O. and H., who carried on business as solicitors at, etc.; that he never executed any mortgage or deed relating to the property claimed by him in the said action, and that the allegation in the statement

of defence in such action that he executed the deeds in such statement of defence mentioned was an untrue statement, and that he did not execute any of such deeds. Whereas, in truth and in fact, the said J. S. S. did employ and consult the said Messrs. O. and H. as his solicitors, and did execute divers mortgage and other deeds relating to the property claimed by him in such action, and the said allegation in the said statement of defence was a true statement, and the said J. S. S. did execute some or all of such deeds, and the false statements so upon oath made by the said J. S. S. were material in the matter then in issue before the court, and the said J. S. S. did thereby commit wilful and corrupt perjury, against the peace, etc.(x) (*Conclude as in book 1, chapter 3.*)

(583) *For perjury committed in an examination before a commissioner of bankrupts.*(y)

That on the twenty-fourth day of October, in the year of our Lord a petition for adjudication of the bankruptcy of one J. S. D. was, under and in pursuance of the statute made and passed in the session of parliament holden in the twelfth and thirteenth years of the reign of our lady the queen, intituled "An act to amend and consolidate the laws relating to bankrupts," filed and prosecuted in the court of bankruptcy in London; and that the said J. S. D. afterwards, to wit, on the day aforesaid, in the year aforesaid, duly became and was declared and adjudicated to be a bankrupt under and within the meaning of the said statute.(z) And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the proceedings upon and in respect of the said bankruptcy were depending in the said court of bankruptcy, to wit, on the seventeenth day of November, etc., J. H., of, etc., yeoman, came before E. H., Esquire, at the bankruptcy court-house, in Basinghall street, in the city of London, and within the jurisdiction aforesaid, to be examined in the said court of bankruptcy, in the matter of the said bankruptcy, by and before the said E. H., touching and concerning the trade, dealings, and estate of the said

(x) In *R. v. Scott*, 13 Cox C. C. 594, it was held that this indictment was good in arrest of judgment, and that the averment of materiality was sufficient.

(y) 5 Cox C. C., Appendix, p. lxxii.

(z) It is unnecessary to set forth the petition. *U. S. v. Denning*, 4 McLean, 3.

bankrupt, the said E. H. then being a commissioner of the said court of bankruptcy, duly appointed and empowered to act in the matter of the said bankruptcy, and to examine the said J. H. in that behalf; and that the said J. H. then and there, before the said E. H., was duly sworn, and took his corporal oath, that the evidence he should give in and upon his said examination should be the truth, the whole truth, and nothing but the truth; the said E. H. then and there having competent power and authority to administer the said oath to the said J. H. in that behalf. And the jurors aforesaid, upon their oath aforesaid, do further present, that at and upon the said examination of the said J. H., and at the time the said J. H. so deposed and swore as hereinafter mentioned, it then and there became and was material in and to the matter of the said bankruptcy, to inquire what was the nature and extent of the dealings of the said J. H. with, and of his purchases from, the said bankrupt, and especially of the extent and of the manner of dealing with respect to such purchases during the months of September and October in the year of our Lord

and whether the said J. H. had, previous to the second day of September in the year aforesaid, made any purchases of goods from the said bankrupt to the extent of ten pounds at one time; and whether certain purchases, for and in respect of which certain invoices, marked respectively B, C, D, E, F, G, H, I, K, L, and M, and produced by the said J. H. at and upon his said examination, were all the purchases over five pounds which the said J. H. had made from the said bankrupt in September, in the year aforesaid; and whether certain invoices, produced by the said J. H. at and upon his said examination, and marked respectively N, O, P, and Q, were all the invoices which the said J. H. had received from the said bankrupt in the month of October, in the year aforesaid; and whether the purchases made by the said J. H. from the said bankrupt, in the said month of October, and for which the said J. H. did not take invoices, exceeded fifteen pounds; and whether the said J. H. had ever gone with the said bankrupt to the house of a pawnbroker in Sloane street, named C. L., to redeem goods; and whether the said J. H. had ever redeemed any deposits made by the said bankrupt to the said C. L., a pawnbroker in Sloane street; and whether the said J. H. had ever sold any goods

which had been received or purchased by the said bankrupt, to one B. P. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. H., being so sworn as aforesaid, did then and there, upon his said examination, upon his oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said E. H., depose and swear, amongst other things, in substance and to the effect following, that is to say, my dealings (meaning his the said J. H.'s dealings) with D. (meaning the said bankrupt) commenced in May last, but they were not then to any extent, and I (meaning the said J. H.) always took a bill of parcels when I purchased to the extent of five pounds or ten pounds. I keep all my bills of parcels; and all the bills of parcels I have had from D. (meaning the said bankrupt) I (meaning the said J. H.) have now with me here, but I had no bills of parcels from D. (meaning the said bankrupt) till the second of September last (meaning the month of September in the year aforesaid), as all my previous transactions with him (meaning the said bankrupt) were of a very trifling character, before the second of September last (meaning the month of September in the year aforesaid), I (meaning the said J. H.) had no one transaction with D. (meaning the said bankrupt) to the extent of ten pounds, but I may have had to the extent of about five pounds, from the second day of September last. I have had invoices of all my (meaning the said J. H.) purchases and dealings with D. (meaning the said bankrupt). I (meaning the said J. H.) do not remember going with the bankrupt (meaning the said bankrupt) to a pawnbroker's in Sloane street, named L., to redeem goods; and I say positively that I never did go there with the bankrupt (meaning the said bankrupt). I (meaning the said J. H.) bought of him (meaning the said bankrupt) in the month of September (meaning September in the year aforesaid), goods to the value of several hundred pounds. I produce all the invoices of my (meaning the said J. H.) purchases of him (meaning the said bankrupt) in September (meaning September aforesaid); they are marked respectively B, C, D, E, F, G, H, I, K, L, and M; those are all the purchases over five pounds which I purchased of D. (meaning the said bankrupt) in September. My purchases of him under five pounds, but of which I took no invoices, were few in number

during that month. My last purchase of D., for which I took an invoice, was on the eighth day of October in the year of our Lord and since that time I have made very trifling purchases of D. I (meaning the said J. H.) produce all my invoices of D. (meaning the said bankrupt) in the month of October (meaning the month of October in the year aforesaid), which are marked respectively N, O, P, and Q. My dealings with D. in this month of October, for which I took invoices, amounted together to about one hundred and fifteen pounds; any other purchases of him (meaning the said bankrupt) in the month of October (meaning October in the year aforesaid) for which I did not take invoices, amounted to not more than fifteen pounds. I (meaning the said J. H.) never did on any occasion redeem any deposits made by D. (meaning the said bankrupt) to Mr. L., a pawnbroker in Sloane street (meaning the said C. L.), and that I speak positively to. I (meaning the said J. H.) never sold any of D.'s goods (meaning any goods which the said J. H. had received or purchased from the said bankrupt) to B. P., of Castle street, Saint Mary Axe (meaning the said B. P.); whereas, in truth and in fact, the said J. H. had, previous to the said second day of September in the year aforesaid, had divers transactions with the said bankrupt, each of which transactions had been and was to a much greater extent than the sum of ten pounds. And whereas, in truth and in fact, the said J. H. had, previous to the said second day of September last aforesaid, made divers purchases of goods of and from the said bankrupt, each of which said purchases had been and was to a much greater amount and extent than ten pounds at one time; and whereas, in truth and in fact, the said purchases for and in respect of which the said invoices marked respectively B, C, D, E, F, G, H, I, K, L, and M, were not all the purchases above the amount of five pounds which the said J. H. had made and purchased from the said bankrupt in the month of September in the year aforesaid; and whereas, in truth and in fact, the said J. H. had, in the said month of September, made divers purchases of goods, to a greater amount than five pounds each purchase, from the said bankrupt, to wit, a certain purchase of five dozen silver spoons and forks, for a sum exceeding five pounds, to wit, twenty pounds; and a certain other purchase of two gold

watches, for a sum exceeding five pounds, to wit, fifteen pounds, the said last mentioned purchases being other and different from any of the said purchases in September aforesaid, the invoices for and in respect of which were so produced by the said J. H. aforesaid ; and whereas, in truth and in fact, the purchases made by the said J. H. from the said bankrupt in the month of October in the year aforesaid, and for which the said J. H. did not take invoices, greatly exceeded the sum of fifteen pounds, and amounted to a much larger sum, to wit, to the sum of one hundred pounds ; and whereas, in truth and in fact, the said J. H. did, to wit, on the eighth day of October in the year aforesaid, go to the shop of the said C. L., in Sloane street aforesaid, to redeem goods, and did then and there redeem of and from the said C. L. certain deposits, made by the said bankrupt to and with the said C. L., as the said J. H. at the time he so deposed and swore as aforesaid then well knew ; and whereas, in truth and in fact, the said J. H. had sold divers goods, to wit, five dozen silver spoons and forks, and four gold watches, which the said J. H. had received from the said bankrupt, to the said B. P., as the said J. H., at the time he so deposed and swore as aforesaid, then and there well knew ; against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the twenty-fourth day of October, in the year of our Lord a petition for the adjudication of the said bankruptcy of the said J. S. D. was, under and in pursuance of the said statute, filed and prosecuted in the court of bankruptcy in London, and that the said J. S. D. afterwards, to wit, on the day last aforesaid, in the year last aforesaid, duly became and was declared and adjudicated to be a bankrupt, under and within the meaning of the said statute. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said proceedings upon and in respect of the said last mentioned bankruptcy were depending in the said court of bankruptcy, to wit, on the first day of December, in the year of our Lord the said J. H. came before the said E. H., Esq., at the bankruptcy court-house, in Basinghall street, in the city

aforesaid, and within the jurisdiction aforesaid, to be examined in the said court of bankruptcy, in the matter of the said bankruptcy, by and before the said E. H., touching and concerning the trade, dealings, and estate of the said bankrupt, he the said E. H. then being a commissioner of the said court of bankruptcy, duly appointed and empowered to act in the matter of the said bankruptcy, and to examine the said J. H. in that behalf; and that the said J. H. then and there, before the said E. H., was duly sworn that the evidence which the said J. H. should give in and upon his said examination should be the truth, the whole truth, and nothing but the truth, the said E. H. then and there having a competent power and authority to administer the said oath to the said J. H. in that behalf. And the jurors aforesaid, upon their oath aforesaid, do further present, that in and upon the said last mentioned examination of the said J. H., and at the time the said J. H. so deposed and swore as hereinafter mentioned, it then and there became and was material in and to the matter of the said bankruptcy, to inquire whether the said J. H. had ever been to the shop of a pawnbroker named C. L., in Sloane street, or to any pawnbroker's in Sloane street, to redeem goods pledged to the said C. L. by the said bankrupt; and whether the said J. H. had, on the twenty-first and twenty-third days of October, in the year aforesaid, respectively, redeemed at the shop of one J. R. goods pledged by the said bankrupt with the said J. R.; and whether the pawnbroker's tickets for and in respect of certain goods which had been redeemed by the said J. H. at the shop of the said J. R., on the twenty-first and twenty-third days of October, in the year aforesaid, respectively, had been received by the said J. H. from the said bankrupt. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. H., being so sworn as last aforesaid, did then and there, upon his said last mentioned examination, upon his oath last aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously depose and swear, amongst other things, in substance and to the effect following, that is to say, I (meaning the said J. H.) did not, on or about the eighth day of October last (meaning October, in the year aforesaid) accompany the bankrupt (meaning the said bankrupt) to, or meet the bankrupt at L.'s in Sloane street (meaning the said C. L.'s), and redeem

two lots of goods pledged by the bankrupt at L.'s; one lot for ten pounds, and the other lot for eighty pounds; I (meaning the said J. H.) never redeemed any lots at L.'s (meaning the said C. L.). I recollect on one occasion meeting the bankrupt (meaning the said bankrupt) near the exhibition, in the evening, and he then asked me to accompany him somewhere in that neighborhood, and I did so, but it was not, to my knowledge, to a pawnbroker's; the bankrupt went in at a private entrance, and the bankrupt beckoned me in, and I saw the bankrupt produce some letter or ticket, and I saw some goods handed out. I helped the bankrupt to count out his money. I then left the room, and the bankrupt, on coming out, told me he had a fine lot of goods, which he proposed to sell me. I (meaning the said J. H.) cannot say whether that was at Mr. L.'s (meaning the said C. L.'s) house. Upon that occasion I did not produce the money, and I did not myself redeem the goods. I (meaning the said J. H.) have redeemed some goods at Mr. R.'s in Shoreditch (meaning the shop of the said J. R.), but I cannot say the date or the amount, nor whose tickets they were, nor if I received the tickets from the bankrupt (meaning the said bankrupt). I cannot say if I redeemed any goods whatever at R.'s since the seventeenth of October last. I redeemed on two occasions at R.'s, goods belonging to the bankrupt, but those I redeemed some time in the summer, with money supplied me by the bankrupt for the purpose, and on those occasions I delivered the goods to the bankrupt. I (meaning the said J. H.) did not, to my recollection, on the twenty-first October last (meaning October in the year aforesaid) redeem goods pledged for fifty pounds, at R.'s, in Shoreditch (meaning the shop of the said J. R.). The bankrupt did not give me money to redeem the goods at R.'s, which it is supposed I redeemed on the twenty-first and twenty-third October last, but I do not recollect that I (meaning the said J. H.) did redeem any such goods about that time at R.'s. I take out a great quantity of goods, which are pledged by other persons, all over London, and I cannot recollect one transaction of that kind from another. I did not, to my knowledge, retain out of the duplicates or deposit notes which I received from the bankrupt, on the seventeenth October, two relating to goods deposited at R.'s for two sums of fifty pounds each, nor do I recollect hav-

ing retained any other of the tickets which I had of D. (meaning the said bankrupt) on the seventeenth October last, besides those I have mentioned in my former examination. The tickets which I did retain of the bankrupt, on the seventeenth October last, and which I have since redeemed, were as follows: One at S.'s for twenty-five pounds, ten shillings; one at Mr. R. A.'s for twenty-seven pounds; and one other at Mr. B. A.'s for eighty pounds. I also retained one other deposit note at Mr. A.'s for one hundred pounds, ten shillings, which I, at the time of my last examination, handed to Mr. V. S. for the assignees. I do not recollect retaining the duplicates which I had from the bankrupt on the seventeenth October last, any other than the four mentioned notes. I (meaning the said J. H.) never had of D. (meaning the said bankrupt) any other pawnbroker's tickets than those I have already stated; therefore if I (meaning the said J. H.) did redeem any goods at R.'s (meaning the shop of the said J. R.) on the twenty-first October last (meaning October in the year aforesaid), and on the twenty-third October last, I (meaning the said J. H.) had not the tickets from the bankrupt (meaning the said bankrupt). Whereas, in truth and in fact, the said J. H. did, on the eighth day of October, in the year aforesaid, accompany the said bankrupt to the shop of the said C. L., in Sloane street, and then redeemed two lots of goods pledged by the said bankrupt at the said C. L.'s, one lot for ten pounds, and the other lot for eighty pounds, as the said J. H., at the time he so deposed as last aforesaid, then well knew. And whereas, in truth and in fact, the said J. H. did produce the money with which the said two lots of goods pledged by the said bankrupt at the said C. L.'s, in Sloane street aforesaid, were redeemed. And whereas, in truth and in fact, the said J. H. did, on the twenty-first day of October, in the year aforesaid, redeem at the shop of the said J. R., goods pledged by the said bankrupt with the said J. R. for fifty pounds, as the said J. H., at the time he so deposed as in this count mentioned, then well knew. And whereas, in truth and in fact, the said J. H. had received the pawnbroker's ticket for and in respect of the said last mentioned goods from the said bankrupt, as the said J. H., at the time he so deposed as aforesaid, well knew. And whereas, in truth and in fact, the said J. H. had, on the twenty-third day of October, in the year

aforesaid, redeemed, at the shop of the said J. R., the goods pledged by the said bankrupt with the said J. R. for fifty pounds, as the said J. H., at the time he so deposed as last aforesaid, well knew. And whereas, in truth and in fact, the said J. H. had received the pawnbroker's ticket for and in respect of the said last mentioned goods from the said bankrupt, as the said J. H., at the time he so deposed as last aforesaid, well knew, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(584) *Against an insolvent in New York, for a false return of his creditors and estate.*(a)

That heretofore, to wit, on, etc., at, etc., one E. W., late, etc., laborer, presented to the honorable R. R., then being the recorder of the city of New York, and authorized to receive petitions under an act of the legislature of the state of New York, entitled "An act to abolish imprisonment for debt in certain cases," passed April seventh, one thousand eight hundred and nineteen, and the several acts relative to insolvent debtors therein referred to, a certain petition of him the said E. W. (as well in his individual capacity, as in his capacity as the partner of one A. B. P.), therein represented as being actually then an inhabitant within the said city, setting forth and showing among other things, that from many unfortunate circumstances he, the said E. W., had become insolvent and utterly incompetent to the payment of his debts, and praying, therefore, that his estates might be assigned for the benefit of all his creditors, to be distributed among them in discharge of the debts of said petitioner, so far as the same would extend, and that the person of said petitioner might be forever hereafter exempted from all arrest or imprisonment for or by reason of any debt or debts due at the time of making said assignment, or contracted for before that time, though payable afterwards, and also, if in prison, from his imprisonment agreeably to an act, entitled "An act to abolish imprisonment for debt in certain cases" (meaning the said act of the legislature of the state of New York), so passed as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do fur-

(a) This indictment was sustained by the supreme court of New York, in *People v. Phelps*, 5 Wend. 10.

ther say, that the said E. W., on the said, etc., at the place aforesaid, pursuant to the directions of said last mentioned act, upon presenting his petition as aforesaid to the said R. R. as aforesaid, delivered to the said R. R. certain papers, purporting to be a full and true account of all the creditors of said E. W. (as well in his individual capacity as in the capacity of a partner of A. B. P.), therein represented to be an insolvent debtor, and the money owing to them, respectively by the said alleged insolvent, the place of residence of each of his creditors, to the best of his knowledge, information, and belief, and the original and *bonâ fide* consideration of his debts, and also a full and just inventory of all the estate, both real and personal, in law and equity, of him the said E. W. represented as last aforesaid, and of all the books, vouchers, and securities (meaning of all the books, vouchers, and securities relating to the same), as well in his individual capacity as in the capacity of the partner of A. B. P., and a list of debts due him the said alleged insolvent, as well in his individual capacity as in the capacity of the partner of A. B. P.

And the jurors aforesaid, upon their oath aforesaid, do further say, that the said E. W., etc., laborer, on, etc., at, etc., unlawfully, wickedly, and maliciously intending and contriving to injure and aggrieve one J. H. and sundry other creditors of him the said E. W., and of him the said E. W. and said A. B. P., fraudulently and wrongfully and unlawfully to obtain the benefit of said act of the legislature of the state of New York, so passed April seventh, one thousand eight hundred and nineteen, upon presenting said petition as aforesaid to the said R. R., recorder as aforesaid, did then and there, pursuant to the directions of the said last mentioned act, produce and exhibit to, and before the said R. R., recorder as aforesaid, a certain oath and affidavit in writing of him the said E. W., and then and there, before the said R. R., was duly sworn, and took his corporal oath concerning the truth of the matters contained in the said oath and affidavit (he, the said R. R., recorder as aforesaid, then and there, by virtue of the said last mentioned act, having a lawful and competent power and authority to administer the said oath to, and to take and receive the said affidavit of him the said E. W. in that behalf), and that the said E. W., being so

sworn as aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and not regarding the said acts of the legislature aforesaid, but fraudulently and wickedly and corruptly devising to suppress and avoid a full and true disclosure of his estate and effects, and to subvert the truth itself, did then and there, to wit, on the said, etc., at, etc., in and by his said oath and affidavit, upon his oath aforesaid, before the said R. R., so being such recorder as aforesaid (he the said R. R. having, by virtue of said acts aforesaid, a lawful and competent power and authority to administer said oath to, and to take and receive said affidavit of the said E. W. in that behalf), falsely, corruptly, knowingly, wilfully, maliciously, and wickedly did say, depose, and swear (among other things), in substance and to the effect following, to wit, I, E. W., do swear that the account of my creditors (meaning the creditors of the said E. W.), and the place of their residence (meaning the place of the residence of his the said E. W.'s creditors), and the inventory of my estate (meaning the inventory of the estate of him the said E. W.), together with the evidences of my title thereto (meaning the evidences of his the said E. W.'s title thereto), which are both herewith delivered (meaning the said papers so purporting as aforesaid, and together with the said petition and affidavit so delivered as aforesaid to the said R. R., being such recorder as aforesaid and in the said affidavit referred to), are in all respects just and true, and that I (meaning the said E. W.), have not at any time or manner whatsoever disposed of or made over any part of my estate (meaning the estate of the said E. W.), for the future benefit of myself (meaning the said E. W.), or my family (meaning the family of the said E. W.), or in order to defraud any of my creditors (meaning the creditors of the said E. W.), or settled with any of my creditors (meaning the creditors of the said E. W.), with a view to obtain the benefit of an act, entitled "An act to abolish imprisonment for debt in certain cases" (meaning the said acts of the legislature of the state of New York, so passed April seventh, one thousand eight hundred and nineteen), as by the said oath and affidavit and petition, with the papers so purporting as aforesaid thereto annexed, and in the said affidavit referred to, filed in the office of the said R. R., recorder as aforesaid, at the City

Hall of the city of New York, in the Sixth Ward of the city of New York aforesaid, in the county of New York aforesaid, more fully appears.

Whereas, in truth and in fact, the said papers, so purporting as aforesaid to be a full and true account of all the creditors of the said E. W. (as well in his individual capacity as in the capacity of a partner of A. B. P.), represented to be an insolvent debtor, and the money owing to them respectively by the said alleged insolvent, the place of residence of each of his creditors, to the best of his knowledge, information, and belief, and the original and *bonâ fide* consideration of his debts, and also a full and just inventory of all the estate, both real and personal, in law and equity of the said E. W., represented to be an insolvent debtor, and of all the books, vouchers, and securities (meaning of all the books, vouchers, and securities relating to the same), as well in his individual capacity as in the capacity of a partner of A. B. P., and a list of debts due said supposed insolvent, as well in his individual capacity as in the capacity of a partner of A. B. P., and so produced and delivered by the said E. W. to the said R. R., recorder as aforesaid (and so referred to by the said E. W. in his said oath and affidavit), as containing an account of his creditors and the place of their residence, and the inventory of his estate, together with the evidences of his title thereto, were not in all respects just and true, as he the said E. W. well knew at the time he took and made said oath and affidavit in manner aforesaid.

And whereas, in fact and in truth, the said papers so produced and delivered as aforesaid, by the said E. W. to the said R. R., so purporting as aforesaid to be a full and just inventory of all the estate, both real and personal, in law and in equity of him the said E. W., represented to be an insolvent debtor, and of all the books, vouchers, and securities (meaning of all the books, vouchers, and securities relating to the same), as well in his individual capacity as in the capacity of the partner of A. B. P., and in the said oath and affidavit of the said E. W. referred to, was not a full and just inventory of all the estate and effects of which he the said E. W. was possessed, or in, or to which he was interested or entitled individually, or in the capacity of the partner of said A. B. P., at the time when the said petition was

so presented as aforesaid, and at the time the said oath and affidavit was taken, and the papers therein referred to were delivered to the said R. R., recorder as aforesaid, as he the said E. W. well knew when he took said oath and affidavit and delivered said papers ;(b) for that the said E. W. then and there, at the time he presented said papers, referred to in said affidavit, and took said oath and affidavit and delivered said papers, was interested in, and owned individually, and as the partner of said A. B. P., the following estate and property, to wit, three thousand five hundred dollars, in goods, wares, and merchandise and money, in the hands of G., M., and Company, merchants in Philadelphia; also, sundry trunks of dry goods, jewelry, and hardware and furniture, found in a dwelling-house lately occupied by said A. B. P., in Elizabeth Street, in said city of New York, of the value of one thousand dollars; also, sundry goods in a store in Chatham Street, of the value of two thousand dollars; and also sundry trunks of dry goods, in the hands of one J. B., of Troy, in said state, of the value of nine hundred dollars; also, sundry notes of hand due from said B., of the value of nine hundred dollars; and sundry other goods, wares, and merchandise, and money, bonds, notes of hand, bills of exchange, and debts due said W., and said W. and P., of great value, to wit, of the value of one thousand dollars, all which was knowingly and fraudulently, by said E. W., left out of his aforesaid inventory and papers, referred to in his said oath and affidavit.

And whereas, in truth and in fact, the said last mentioned papers so purporting as aforesaid to be a full and just inventory of all the estate, both real and personal, in law and equity of him the said E. W., represented to be an insolvent debtor, and of all the books, vouchers, and securities (meaning of all the books, vouchers, and securities relating to the estate of him the said E. W.), as well in his individual capacity as in the capacity of the partner of A. B. P., and a list of debts due said alleged insolvent, as well in his individual capacity as in the capacity of the partner of A. B. P., and so produced and delivered as aforesaid, by the said E. W. to the said R. R., recorder as aforesaid, and in said affidavit and oath of the said E. W. referred to, was

(b) See as to scienter, etc., *supra*, pp. 11, 12; Wh. Cr. Pl. and Pr. § 164; Wh. Cr. L. 8th ed. § 1246.

not a just and true inventory and account of all such parts of the goods, wares, and merchandise, money, estate, and effects of him the said E. W., in his individual capacity, or in the capacity of the partner of said A. B. P., and of all books, vouchers, and securities relating thereto, as were at the time when the said petition and affidavit, and the said papers so purporting as aforesaid, and in the said oath and affidavit of the said E. W. referred to, were so produced and delivered by the said E. W. to the said R. R., recorder as aforesaid, in the custody, possession, power, or knowledge of him the said E. W.; for that said E. W. was then and there, to wit, at the time of presenting said papers and taking said oath, and presenting said affidavit, interested in a large part and proportion of the estate and property above enumerated, and other property, consisting of dry goods, merchandise, and debts due, to a large amount, to wit, one thousand dollars.

And whereas, in truth and in fact, the said E. W., at the time when the said papers as aforesaid, and in the said oath and affidavit of the said E. W. referred to, were so produced, presented, and delivered by the said E. W. to the said R. R., recorder as aforesaid, to wit, on the said twenty-sixth day of October, in the year of our Lord one thousand eight hundred and twenty-nine, at the second ward of the city of New York aforesaid, in the county of New York aforesaid, for the future benefit of himself or his family, had disposed of and made over a part of his the said E. W.'s personal estate of great value, to wit, the money, notes of hand, bonds, acceptances, furniture and goods, wares, and merchandise above enumerated, of the value of five thousand dollars, the same not being the necessary wearing apparel of himself or his family, or the beds or bedding of his the said E. W.'s family, with the intent to defraud some one or more of his the said E. W.'s creditors, and with a view to obtain fraudulently the benefit of the said act of the legislature of the state of New York, entitled "An act to abolish imprisonment for debt in certain cases," so passed as aforesaid, April seventh, one thousand eight hundred and nineteen.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. W., on, etc., at, etc., in his oath and affidavit aforesaid, before the said R. R., as such recorder as aforesaid,

upon his oath aforesaid (he the said R. R. then and there having and possessing, by virtue of said acts of the legislature aforesaid, a lawful and competent power and authority to administer the said oath to him the said E. W. so as aforesaid, and then and there to take and receive the said affidavit of the said E. W.), by his own act and consent, and in form and manner aforesaid, did knowingly, falsely, maliciously, wilfully, and corruptly commit wilful and corrupt perjury, in and upon points and things material to his obtaining the benefit of the said act of the legislature of the state of New York, entitled "An act to abolish imprisonment for debt in certain cases," to the great displeasure of Almighty God, in contempt of the said acts of the legislature aforesaid, to the evil example of all others in like cases offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(585) *Against an insolvent in Pennsylvania, for a false account of his estate.*(c)

That I. L., late, etc., on, etc., being a person charged in execution for divers sums of money not exceeding in the whole the sum of one hundred and fifty pounds, and contriving and intending to cheat and defraud a certain J. H. and others his creditors of their just debts, upon the application and petition of him the said I., presented to the county court of common pleas, holden at Philadelphia, in and for the county of Philadelphia, was brought up before the justices of the same court, agreeably to the directions of the act of assembly, entitled "An act for the relief of insolvent debtors within this province of Pennsylvania," and then and there, in his petition aforesaid, did affirm and assert, that he the said I. had no estate real or personal, and then and there, before the justices of the same court, did take his corporal oath, administered according to law and the directions of the said act, by the said court, and then and there, before the said court, upon his oath aforesaid, falsely, corruptly, and maliciously and wilfully did swear, depose, and affirm, that the account by him the said I. delivered into the said court, in his said petition to the said court, did contain a full and true account of all his real and personal estate, debts, credits, and effects whatsoever,

(c) This indictment was drawn by Mr. Bradford, then state attorney-general, and found and sustained in 1787, under the laws then in force.

which he the said I. or any in trust for him then had, or at the time of his imprisonment had, or then was in any respect entitled to, in possession, remainder, or reversion, except the wearing apparel and bedding for him or his family, and the tools or instruments of his trade or calling, not exceeding five pounds in value, in the whole, and that he had not at any time since his imprisonment or before, directly or indirectly, sold, leased, assigned, or otherwise disposed or made over in trust for himself, or otherwise, other than as mentioned in such account, any part of his lands, estate, goods, stock, money, debts, or other real or personal estate, whereby to have or expect any benefit or profit to himself, or to defraud any of his creditors to whom the said I. was then indebted; whereas, in truth and in fact, he the said I. then had, and well knew that he had, a certain debt amounting to the sum of seven pounds and ten shillings, due from a certain J. M. and payable to him the said I. L., and whereas, in truth and in fact, the said I. L. then and there had, and well knew that he had, divers other debts, goods, and chattels, exceeding in value the sum of five pounds; and so the inquest aforesaid, upon their oaths and affirmations aforesaid, do say, that the said I. L., on the day and year aforesaid, at the city aforesaid, before the court aforesaid, in manner and form aforesaid, falsely, maliciously, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, and against, etc. (*Conclude as in book 1, chapter 3.*)

(586) *For false swearing, in answering interrogatories on a rule to show cause why an attachment should not issue for a contempt in speaking opprobrious words of the court in a civil suit.*(d)

That at a court of common pleas held at Chambersburg, in and for the county of Franklin, before J. R., Esq., and his associates,

(d) In *Res. v. Newell*, 3 Yeates, 407, several exceptions were taken to the indictment in arrest of judgment, which are fully discussed by Smith, J. :—

“1. The first reason is, that the deposition on which the perjury is assigned is stated to be on an interrogatory filed between the commonwealth and the defendant, on the part of the commonwealth; without stating any proceeding between the commonwealth and the defendant, in which the said deposition would be material.

“This objection was taken at the trial under another shape, and was overruled by the court. It was then said, that the interrogatories were wrongly entitled; that the plea was pending between James Taylor and Thomas Shirley, and the rule was entered in that cause; and inasmuch as the proceedings were on the civil

judges of the said court, upon, etc., a certain plea was then and there pending between a certain J. T., plaintiff, and a certain T.

side of the court until the attachment issued, the interrogatories should have been filed in that suit, and headed accordingly. To this point were cited 3 Term Rep. 253, and 6 Term Rep. 642. note, and the case of Caleb Wayne, lately decided in the circuit court of the United States, for the eastern district of Pennsylvania. The answer given was, that we had not adopted that nicety of form here which was practised in England; but at the utmost, that the defendant should have taken advantage of the informality and showed to the court the grounds of his refusal to answer the interrogatories. He was now too late, after he had come in and voluntarily submitted to answer. The rule was entered in December term, 1799, that the defendant should show cause why an attachment should not issue against him, for treating the process of the court with contempt, and using opprobrious words respecting the court. This rule was grounded on due proof made of his improper conduct previous thereto. He was then actually *in contempt*. We considered the rule to show cause in such a case as wholly unnecessary. For contemptuous words spoken of a court, its rules, or process, an attachment issues immediately of course. Sayer, 114; 1 Stra. 185. The party must answer in custody, for it is to no purpose to serve him with a second rule, that has slighted and despised the first; it would expose the court to further contempt. 1 Salk. 84. The issuing of the court on its criminal side grew out of the civil action, returned on the *certiorari* in the plea above stated, and the oath of the party became material. The issuing of the attachment is only for the purpose of bringing in the party to answer to the interrogatories, and if he can swear off the contempt he is discharged. 12 Mod. 348. If he deny all on oath, he is set at liberty; but he must be indicted for perjury if he forswear himself. 12 Mod. 511; 8 Mod. 81; Dougl. 498; 1 Strange, 444; Annally, 178; 4 Burrow, 2106. When, therefore, Newell appeared in the court of common pleas, to purge himself of the contempt charged against him, we viewed him in the same light as if his presence had been enforced by attachment, and were of opinion that, in either case, the interrogatories should be entitled in the same manner. We considered the rule to show cause stated in the indictment as mere matter of inducement. An indictment for perjury at an assize may allege the oath to have been taken before one of the judges in the commission, though the names of *both* are inserted in the caption. Leach, 154.

“2. The second objection is, that it is not stated that the defendant took an oath on the holy gospel of God, or in the presence of Almighty God, by uplifted hand. The indictment charges, that ‘the said Robert Newell did then and there, in *due form of law*, take his *corporal oath*,’ etc. This form was approved of by Lord Hardwicke, who says, the words *corporal oath* may stand for lifting up an arm or other bodily member. What is universally understood by an oath is, that ‘the person who takes it imprecates the vengeance of God upon him if the oath he takes is false.’ 1 Atkyns, 20. In the great case of *Omychund v. Barker*, Ld. Chan. Baron Parker said he did not think *tactis sacris Evangelii* were necessary words; for several old precedents are, that the party was *juratus generally*, or *debito modo juratus*; vide West’s Symb. 2d part, under the head of Indictments and Offences, s. 160. 1 Atkyns, 43, 44. Lord Chief Justice Willes says, that *sacrosancta Evangelia* are not at all material words in indictments for perjury. Ib. 46. Lord Chancellor Hardwicke asserts the same opinion, and observes that the framers of indictments are apt to throw in words, and to swell them out too much to no purpose; therefore the old precedents are the best. Ib. 50. According to Lord Chief Justice Kenyon, an indictment for perjury is sufficiently certain, if it only states the defendant to have been *in due manner sworn*. Peake, 156; vide Ib. 23; Leach, C. C. 348.” See further cases on this point, Wh. Cr. L. 8th ed. §§ 1287 *et seq.*

“3. The third reason in arrest of judgment is most material, and has obtained

S., defendant, upon a *certiorari* directed to R. N., Esq., and returned into the said court, and the said court did then and there

from us much consideration. It is this; that in the assignment of the perjury, it is not stated that the defendant did *falsely*, *corruptly*, and *wilfully* swear, etc.

"If the indictment is considered as grounded on the statute 5 Eliz. c. 9, it is certainly defective; because the words *wilfully* and *corruptly* are inserted in the sixth paragraph, as material descriptions of the offence. And it is clearly settled, that in every prosecution on this statute the words thereof must be exactly pursued; and therefore, that an indictment or action on the said statute, alleging that the defendant deposed such a matter *false* and *deceptive* (2 Leon. 211, 3 Leon. 230; 1 Show. 190), or *false et corruptivè* (Hill. 12; Cro. El. 147), or *false and voluntariè* (Sav. 43), without expressly saying that he did it *voluntariè et corruptè*, is not good, and that such a defect cannot even be supplied by adding the words *contra formam statuti*, or concluding *et sic voluntarium et corruptum commisit perjurium*. 2 Leon. 214; 1 Leon. 230; Savil. 43; Cro. El. 147; 1 Hawk. c. 69, s. 17.

"The present indictment concludes, 'contrary to the act of general assembly in such case made and provided.' But on examining our statute book it will be found, that the only law respecting this offence in courts of justice was enacted on the 31st May, 1718, the 24th section whereof goes to subornation of perjury; and the 25th section extends the English statute of 5 Eliz. c. 9, and declares that this statute shall be put into due execution here. 1 St. Laws, 143. The act of 5th April, 1790 (2 St. Laws, 804), which was made perpetual by the act of 4th April, 1799 (4 St. Laws, 399), prescribes fine and imprisonment in lieu of the former infamous punishments of pillory and whipping. It will be further found, that this statute of 5 Eliz. c. 9, extends to no other perjury than that of a *witness*; and therefore no one can come within the statute by reason of any false oath in an answer to a bill in chancery (Cro. El. 148; 2 Leon. 201; Dalis. 84; Yelv. 120), or in swearing the peace against another (2 Roll. Abr. 77, pl. 5), or by reason of a false wager of law (Noy. 7, 108), or for taking a false oath before commissioners appointed by the king, to make an inquiry concerning his title to certain lands. Moore, 627; 1 Hawk. c. 69, s. 20. It therefore necessarily follows, that if the indictment had been framed with the utmost correctness, under the statute of 5 Eliz., the offence of the defendant was not punishable thereby, because he was not a witness, examined in a court of justice, in the usual course of proceeding.

"Perjury is defined by Lord Coke to be a crime committed, when a lawful oath is administered in some judicial proceeding to a person who swears *wilfully*, *absolutely*, and *falsely*, in a matter material to the issue, or point in question. 3 Inst. 164; 4 Bl. Com. 137. And in 10 Mod. 195, it is laid down, that the oath must not only be *false*, but *wilful* and *malicious*, to make it perjury. Here the *legality* of the oath, and the *propriety* of the judicial procedure, are indisputable. The indictment states that the defendant did 'then and there *voluntarily*, and of his own *free will* and *accord*, propose to the said court to purge himself upon oath of the said contempt alleged against him; that he was then and there duly sworn on his corporal oath, and then and there did answer and declare,' etc.; negating by express averments the truth of his oath, with a conclusion, that 'he, the said Robert Newell, the day and year aforesaid, at Chambersburg aforesaid, etc. etc., by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner aforesaid, did *knowingly*, *falsely*, *wickedly*, *maliciously*, and *corruptly* commit wilful and corrupt perjury,' etc.

"On the bare reading of the indictment, one would reasonably suppose that the *wilfulness*, *absoluteness*, *falsity*, and *malice* of the oath were sufficiently asserted and charged against the defendant. But his counsel have ingeniously objected that it does not pursue the course of the precedents, and that the offence is not laid in a manner known to the law.

make a rule of the said court in substance as follows, to wit:
 "Rule that R. N., Esq., show cause by the next term, why an

"We hold ourselves bound by precedents. We flatter ourselves, we can say with Lord Chief Justice Kenyon, 'It is our wish and comfort to stand *super antiquas vias*.' 7 Term. Rep. 668. In criminal cases, we will not intentionally inflict new hardships on any one, let our individual feelings be what they may. To satisfy our minds in this particular, my brother Yeates and I have made diligent and painful researches into the books of entries on the criminal law. The result of our inquiries has been as follows:—

"In *Rex v. Oates*, 5 St. Tri. 4, the indictment for perjury charges him that he *falsely, voluntarily, and corruptly* did say, etc. So on the second indictment against him. Ib. 70. In *Rex v. Sir Patience Ward*, 3 St. Tri. 661, the information states that he *falsely and corruptly* did swear, etc. In *Rex v. Elizabeth Canning*, 10 St. Tri. 206, the indictment charges that she did *falsely, wickedly, voluntarily, and corruptly* say, etc. In Tremaine's Pleas of the Crown, p. 136 to 167, there are thirteen indictments for perjury, all of which are laid with the epithets (or some of them) *falsely, corruptly, maliciously, and voluntarily*, etc. In Stubb's Crown Circ. Comp. 308 to 334, there are seven indictments, with the same epithets, applied to the acts of swearing. So in Clift's Entries, 399, 401, there are two informations for perjury at the assizes, that the defendant *maliciously, voluntarily, and corruptly* swore, etc. And in *Rex v. Greepe* (5 Mod. 343). an information at common law for perjury in a trial at bar in replevin, charges the defendant that he *falsely, maliciously, voluntarily, and corruptly*, on his oath said, etc. In Co. Ent. 164, b, 357, a, there are two precedents of actions brought in debt on the statute 5 Eliz. c. 9, wherein it is laid, that the defendants *voluntarily and corruptly* swore, etc. And so in many other actions of debt in other books.

"On the other hand, in the same book, 165, b, there is a form in a deposition before commissioners on interrogatories in chancery, wherein the epithets are not used. So in Rast. Ent. 481, the declaration lays the swearing without those terms, *per quod idem R. voluntarie et corruptive commisit perjuriū voluntarium*.

"In *Officium Clerici Pacis* (a book containing many excellent precedents), fol. 87, we find an indictment for perjury, in a deposition resembling the present case in all particulars. It states that the defendant 'being sworn, said and upon his oath affirmed and deposed in manner following, etc. Whereas, in truth and in fact, etc., voluntarily and corruptly committed voluntary and corrupt perjury,' etc. Again, in West's Symbol, 119, b, s. 160, another form of the same kind occurs for perjury in a deposition before commissioners, by commission out of the court of wards. But in the same book and page, s. 161, for perjury in a deposition before commissioners, by commission out of chancery on the statute of 5 Eliz., after the words in the indictment, 'whereas in truth the said H. S. did not cause, etc., neither, etc. (*negando effectum depositionis*), *prout prædict. W. falsè and corruptè deposuit et juravit per quod*,' etc. And again (Ib. 138, s. 241), an indictment for perjury committed in an answer, in the exchequer at Chester, states, that the defendant on his oath, 'said, affirmed, and swore these English words following, etc., and so the said R., in making and confirming his answers in that part aforesaid, the day of at, etc., voluntarily and corruptly committed voluntary perjury,' etc.

"It is evident, therefore, that the forms of indictment at common law for perjury are not uniformly the same; but the words *falsely, corruptly, and wilfully*, as applied adjectively or adverbially to the act of swearing, are mere expletives to swell the sentence, in the language of Lord Hardwicke. 1 Atkyns, 50.

"We find no adjudged case or dictum in the books, that such words are appropriate terms of art, descriptive of the crime of perjury, at common law, as *murdravit* in an indictment for murder, *cepit* in larceny, *mayhemavit* in may-

attachment shall not issue against him for treating the process of this court with contempt, and using opprobrious words to a person who served upon him a copy of a rule of this court, while the person was engaged in that service."

And the jurors aforesaid do further present, that afterwards, to wit, upon, etc., in the county aforesaid, and within the jurisdiction of this court, the said R. N., Esq., of the county aforesaid, did appear in his proper person, before the said court of common pleas, held by the judges aforesaid, and did then and there voluntarily and of his own free will and accord, propose to the said court to purge himself upon oath of the said contempt alleged against him, whereupon certain interrogatories were then and there drawn up in writing, and proposed to the said R. N., Esq., in substance as follows, to wit:—

Pennsylvania against R. N., Esq.—In the Common Pleas of Franklin County.

Interrogatories exhibited on the part of the commonwealth.
1st. Did T. S., at any time previous to the last December term for this county, serve you with a copy of a rule of the court of common pleas of Franklin county, to show cause why an at-

hem, *feloniee* in felony, etc. 2 Hawk. c. 25, s. 55. On the contrary, we do find it laid down by the judges, that an indictment for perjury at common law does not require so much certainty as on the statute, and that it need not be in a court of record, or matter material to the issue. 5 Mod. 348; 1 Sid. 106. And in Cox's case (Leach, 69), it was agreed by ten judges unanimously, that the word *wilfully* was not essentially necessary in an indictment for perjury at common law, though it was essential in an indictment for perjury under the statute of 5 Eliz. c. 9, because the term *wilful* in the statute is a material description of the offence. Still it is necessary, that it should appear by the indictment that the oath was *wilfully false*.

"It will readily be agreed that all indictments must have a precise and sufficient certainty, and that the offences must be set forth with clearness and certainty. 4 Bl. Com. 305, 306. Every person should be apprised of the distinct charge made against him, in order that he may come fully prepared for his defence. But in the words of the humane Lord Hale, 'the great strictness and unseemly niceties, required in some indictments, tend to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonor of God.' 2 Hale, P. C. 193.

"4. The last reason offered in arrest of judgment is, that the indictment is insensible and repugnant, and is defective both in form and substance. This objection being made in general terms, must necessarily refer to the supposed defects before particularly specified and already considered.

"Upon the whole, on the best consideration which my brother Yeates and I have been capable of giving to the different reasons filed in arrest of judgment, our official duty constrains us to say, that they are not relevant in point of law, and that the commonwealth is entitled to judgment."

tachment should not issue against you for a contempt of the said court? 2d. After having read the copy of the rule mentioned in the first interrogatory, did you say, "Damn the court, they are a set of damned stool-pigeons," and say, "If the court want a copy of my judgment, they may come for it?" or did you make use of any of the expressions above stated?

And the said R. N. did then and there, in due form of law take his corporal oath before the said court (they having sufficient and competent power and authority to administer an oath to the said R. N. in that behalf), that he the said R. N. would true answers make to the said interrogatories; and he the said R. N., being so sworn upon his corporal oath, on the matters contained in the said interrogatories, did then and there answer and declare before the said court, in answer to the said second interrogatory, that he (himself the said R. N. meaning) did not make use of any of the expressions therein (the said interrogatory meaning) contained; whereas, in truth and in fact, the said R. N., after having read the copy of the rule of the court aforesaid, did say, "Damn the court, they are a set of damned stool-pigeons." And whereas, in truth and in fact, the said R. R., after having read the copy of the rule last aforesaid, did say, "If the court want a copy of my judgment" (the judgment of him the said R. N. in the said cause between J. T. and T. S. meaning), "they may come for it." And so the jurors aforesaid, upon their oaths and affirmations aforesaid, respectively do say, that the said R. N., on the said third day of April, in the year last aforesaid, at C. aforesaid, in the county aforesaid, and within the jurisdiction of this court, upon his oath aforesaid, before the said court of common pleas (the said court of common pleas then and there having sufficient and competent power and authority to administer the said oath to the said R. N.), by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner and form aforesaid, did knowingly, falsely, wickedly, maliciously, wilfully, and corruptly commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil and pernicious example of all others in like case offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(587) *In charging J. K. with larceny before a justice of the peace.*(e)

That formerly, to wit, on, etc., at the county aforesaid, J. M'C., late, etc., came before J. S., Esq., then and yet being one of the justices of the commonwealth of Pennsylvania assigned to keep the peace in and for the said county of Philadelphia, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, and the said J. M'C. well knowing the premises, and wickedly devising and intending unjustly to aggrieve one J. K., and to procure him without any just cause to be imprisoned, and kept in prison for a long space of time, on the said twelfth day of December, in the year aforesaid, at the county aforesaid, the said J. M'C. then and there being present in his own proper person, before the said J. S., Esq., then and there being one of the justices of the commonwealth assigned to keep the peace in and for the said county of Philadelphia, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the same county, he the said J. M'C. did then and there take his solemn affirmation before the said J. S. (he the said J. S. then and there having sufficient and competent power and authority to administer the said affirmation to the said J. M'C. in that behalf), and that the said J. M'C., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, then and there before the said J. S. upon his affirmation aforesaid, falsely, maliciously, wickedly, wilfully, and corruptly did say, depose, affirm, and declare (among other things), in substance and to the effect following, that is to say, that he the said J. M'C., on the twelfth day of December, in the year aforesaid, at the county aforesaid, was possessed of five silver dollars, and he the said J. M'C. being so possessed thereof, the said J. K., with force and arms, etc., at the county aforesaid, did take and carry away the said five silver dollars out of and from the possession of the said J. M'C., thereby meaning and intending that the said J. K. was guilty of larceny, and had with force and arms feloniously stolen, taken, and carried away the said five silver dollars, against the peace of the commonwealth, at the county aforesaid; whereas, in truth and in

(e) Drawn in 1794 by Mr. Jared Ingersoll, attorney-general of Pennsylvania.

fact, at the time he the said J. M'C. so took his solemn affirmation aforesaid, in form aforesaid, or at any other time, the said J. K. had not, with force and arms, taken and carried away the said five silver dollars out of the possession of the said J. M'C., nor had with force and arms, and against the peace of the commonwealth, feloniously stolen, taken, and carried away the same, but the said J. M'C. at the time he so took the affirmation aforesaid, in form aforesaid, then and there well knew that the said J. K. had not with force and arms and against the peace of the commonwealth, taken and carried away the said five silver dollars, out of the possession of the said J. M'C., nor feloniously, with force and arms, and against the peace and dignity of the commonwealth, stolen, taken, and carried away the said five silver dollars; and so the jurors aforesaid, upon their oaths and affirmations aforesaid, do say, that the said J. M'C., on the twelfth day of December, in the year aforesaid, at the county aforesaid, before the said J. S., being such justice aforesaid (and then and there having sufficient and competent power and authority to administer the said affirmation to the said J. M'C.), and within the jurisdiction of this court, by his own act and consent, and of his own wicked and corrupt mind and disposition, in manner and form aforesaid, did falsely, wickedly, and wilfully and corruptly commit wilful and corrupt perjury, to the great displeasure of Almighty God, to the evil and pernicious example of all others in the like cases offending, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(588) *In charging A. N. with assault and battery before a justice.* (f)

That heretofore, to wit, on, etc., at, etc., K. M., late, etc., came before H. M'K., Esq., then and yet being one of the justices, etc.,

(f) *State v. Mumford*, 1 Dev. 219.

After a verdict for the state, the counsel for the prisoner moved in arrest of judgment, contending that the assignment of perjury was not sufficiently certain, and in effect was nothing more than a negative pregnant; his honor, the presiding judge, being of that opinion, arrested the judgment, whereupon Taylor, chief justice, said: "The objection taken in arrest of judgment is founded on the assumption that the only material inquiry before the justice, whether Noble had assaulted Mumford or not, on the day specified, and that whether he struck him on the back or not at the last wrestle, was irrelevant and unconnected with that question; that the assignment of perjury in the circumstances is consistent with the belief that the defendant might have sworn truly as to the principal fact, viz., the assault. This presents two questions, whether the materiality of the inquiry

and then and there upon her oath charged one A. N., before the said H. M'K., the justice, etc., with having assaulted, stricken, etc., one H. M., being the husband of her the said K. M. And the jurors, etc., further present, that upon the examination of the said K. M., before, etc., upon her oath aforesaid, touching

is sufficiently stated in the indictment, and whether the assignment of perjury is properly and distinctly made?

"It is laid down as a rule, which I found nowhere controverted, that it should appear on the face of the indictment that the oath taken was material to the question depending, not by setting forth the circumstances which render it so in describing the proceedings of a former trial, but by a general allegation that the particular question became material. In Aylett's case, a leading one on this subject, it is stated that it became a material question on the hearing of the complaint, and the hearing of that is stated in general terms. 1 Term. Rep. 66. In the *King v. Dowlin* the question was much debated; it is there stated that the question became material on the trial, in the same general terms that it is stated here, and the trial is referred to in this manner, that 'at such a court J. R. was in due form of law tried upon a certain indictment, then and there depending against him for murder.' Dowlin was a witness against J. R. on that trial, and the perjury was assigned in his swearing, that 'he had never said that he would be revenged of the said J. R. and would work his ruin.' On this part of the case it was argued on behalf of Dowlin that all those facts ought to be stated in the proceedings against J. R. which were necessary to show that the jurisdiction was competent, that there was something to be tried; the materiality of the question to that point, and the falsity of the oath. This objection is thus directly met by Lord Kenyon: 'But it has been objected that it was necessary to set forth in the indictment so much of the proceedings of the former trial, as will show the materiality of the question on which the perjury is assigned. If it were necessary, and if the question arose on the credit due to the witness, the whole of the evidence given before must be set forth; but that has never been held to be necessary, it always having been adjudged to be sufficient to allege generally, that the particular question became a material question. But here it is averred, that the question on which perjury was assigned was a material question; the jury have found it so by their verdict.' 5 Term Rep. 319.

"In this indictment, the warrant and examination before the magistrate are stated, and the general allegation of the materiality of the question is in conformity with the best forms, and, considered in reference to the statute on this subject (Rev. ch. 383), appears to me unexceptionable.

"The matter sworn to by this defendant is contradicted in the assignment of perjury, specially and particularly, and in the words in which it was sworn. A general averment upon the whole matter that the defendant falsely swore, is not sufficient; it should be specific and distinct, to the end that the defendant may have notice of what he is to come prepared to defend. 2 M. & S. 385. And the whole matter of the defendant's false testimony must be set forth, and if the least part of one entire assignment be unproved, she could not be convicted. The offence charged consists in the whole and not in any one part of the assignment. And this, in my opinion, obviates the necessity of any opinion as to how far perjury may be committed, if the false oath has a tendency to prove or disprove the matter in issue, although but circumstantially; or how far the fact sworn to, though not material to the issue, must have such a connection with the principal fact, as to give weight to the testimony on that point. These views of the subject could in this case only be properly presented to the court trying the cause. I think the conviction is right."

and concerning the alleged assault by the said A. N., in and upon the said H. M., certain questions then and there became and were material, that is to say, whether A. N. did strike her husband H. M. with a stick across the back at the last time he and V. P. wrestled, and whether the blow across the back with a stick was given immediately as he fell. And the jurors, etc., do further present, that the said K. M., wickedly devising and intending unjustly to aggrieve the said A. N., and procure him to be imprisoned, and kept in prison for a long space of time, on, etc., at, etc., before the said H. M'K., then being, etc., she the said K. M. did then and there take her corporal oath, and was sworn upon the holy gospel of God before the said H. M'K., justice, etc., he the said H. M'K. then and there having sufficient and competent power and authority to administer an oath to the said K. M. in that behalf, and that the said K. M., not having, etc., but being moved, etc., then and there before the said H. M'K., justice, etc., upon her oath, etc., falsely, etc., did depose, say, swear, give and make information, among other things, in substance and to the effect following, that is to say, that N. (meaning the said A. N.) did strike her husband H. M. with a stick across the back, at the last time he (meaning the said H. M.) and V. P. (meaning a certain V. P.) wrestled, and the blow (meaning the blow with the stick across the back of the said H. M.) was given immediately as they (meaning the said H. M. and the said V. P.) fell; whereas, in truth and in fact, the said A. N. did not strike her husband H. M. with a stick across the back, at the last time he the said H. M. and V. P. wrestled, and whereas, in truth and in fact, the blow was not given as they (the said H. M. and the said V. P.) fell. And so the jurors aforesaid, etc. etc.

(589) *In false swearing by a person offering to vote, as to his qualifications when challenged.*(g)

That on, etc., at an annual election held at the town of Porter, in the county of Niagara, for the choice of a senator from the eighth senatorial district of the state of New York, one member

(g) *Campbell v. People*, 8 Wend. 636. I have been unable to obtain the record in this case, but the report appears to give the substantial averments of the indictment.

of assembly, and a sheriff for said county, and four justices of the peace for the town of Porter, held pursuant to the constitution and laws of the state before the board of inspectors of the said election then sitting at the house of, etc., in the town of Porter, which said board being then and there legally constituted and organized according to law to receive all legal or lawful votes or ballots for said officers to be elected as aforesaid, R. C., etc., appeared before the board and offered his vote or ballots for some or all of said officers, whereupon, before his vote or ballots were given in, he was duly challenged touching his right or legal ability to vote at said election for the said officers or either of them, and on being challenged he was then and there duly sworn and did take his corporal oath before the said board, so constituted and sitting as aforesaid, the said board being then and there duly authorized and empowered to administer an oath to the said R. C. in that behalf; and he the said R. C., being then and there sworn by and before the said board, and not regarding the laws of the state, etc., did then and there falsely, wilfully, and corruptly say, depose, and swear to and before the board aforesaid, touching his right to vote and his qualifications as a voter at said election for the officers aforesaid, in substance and effect as follows, among other things, that is to say, that he the said R. C. was a natural born or a naturalized citizen of the state of New York, or one of the United States of America; whereas, in truth and in fact, he the said R. C. was not a natural born or naturalized citizen of the state of New York, or one of the United States of America; and so the jurors aforesaid say, that the said R. C., on, etc., did commit wilful and corrupt perjury, etc.

(589a) *Perjury before election judge.*

That on, etc., at, etc., at a certain election for trustees and village clerk of the village of G., in said county, called and held in pursuance of law, in said village of G., one O. S. having offered to vote at said election, and his said vote having been challenged by a legal voter at said election, by reason of said challenge his vote was refused by the judges of said election, then and there present, whereby it became material that an affidavit, as required by law, should be made, C. J., of the said, etc.,

came in his own proper person before J. B. G., one of the judges of said election, and then and there produced a certain affidavit of him, the said C. J., and then and there before the said J. B. G., judge as aforesaid, in due form of law, was sworn concerning the truth of the matter contained in said affidavit, he, the said J. B. G., then and there having full power and authority to administer the said oath to him, the said C. J., in that behalf; and that the said C. J., being so sworn, then and there upon his oath aforesaid, before the said J. B. G., who had full power and authority to administer the same as judge of said election, feloniously, wilfully, corruptly, and falsely, in and by his said affidavit, did depose and swear (among other things) in substance and to the effect following, that is to say: that the person whose vote is now offered (meaning the said O. S.) is an actual and *bona fide* resident of this election district (meaning the said village of G.), and has resided herein (meaning said village of G.) thirty days next preceding this (meaning said election then and there being held) election, as in and by the said affidavit will at large and more fully appear, it being then and there material that the said O. S. should be an actual and *bona fide* resident of said village of G., and should have resided therein thirty days next preceding said election, in determining his right then and there to deposit his vote with the judges of said election; whereas, in truth and in fact, as the said C. J. then and there well knew, the said O. S., at the time the said C. J. made his oath and affidavit as aforesaid, was not an actual and *bona fide* resident of said election district, and had not resided therein thirty days preceding said election, etc.^(h) (*Conclude as in book 1, chapter 3.*)

(590) *In an affidavit to hold to bail, in falsely swearing to a debt.*⁽ⁱ⁾

That A. B., of, etc., wickedly and maliciously contriving and intending one C. D. unlawfully to aggrieve and oppress, and the said C. D. to a great expense of his moneys wickedly and maliciously to put and bring, and also to cause the sum of to be indorsed upon a process of the court of by virtue of which the said C. D. might be arrested to answer in the same court, at

(h) Approved in substance in *Johnson v. People*, 94 Ill. 505.

(i) Altered by Mr. Davis, Prec. 200, from 2 Chit. C. L. 323.

the suit of E. F., with intent that the said C. D. should be compelled to find bail for the aforesaid sum of on, etc., at, etc., came in his proper person before G. H., Esq., then being one of the justices of said court; and then and there in due form of law was sworn, and did take his oath before the said G. H., Esq., one of the justices of the said court as aforesaid (he the said G. H. then and there having sufficient and competent authority and power to administer an oath to the said A. B. in that behalf), and that the said A. B. being so sworn as aforesaid, then and there, before the said G. H., Esq., upon his oath aforesaid, falsely, wickedly, wilfully, and corruptly did say, depose, swear, and make affidavit in writing (among other things), in substance and to the effect following, that is to say (*here insert that part of the affidavit that is false*), as by the same affidavit now filed in the court aforesaid, more fully appears; whereas, in truth and in fact, the said A. B. (*here negative the facts alleged as false*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. B., in manner and form aforesaid, did commit wilful and corrupt perjury, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(591) *For false swearing in an affidavit in a civil cause, in which the defendant swore that the arrest was illegal, etc. The perjury in this case is for swearing to what the defendant did not know to be true.*(j)

That before the making of the affidavit in this count mentioned, to wit, on, etc., a certain judgment was signed in her

(j) *R. v. Newton*, 1 C. & K. 469. The defendant was acquitted, but as this is the only precedent that has been given in the books of false swearing, not of what the defendant knows to be false, but of what he does not know to be true, it is here published. (See *supra*, p. 12.)

"On this point," says the reporter, in a marginal note, "it is laid down by Lord Coke, 3 Inst. 166, that the law taketh a diversity between falsehood in express words, and that it is only within this statute (5 Eliz. c. 9), and falsehood in knowledge or mind, which may be punished though the words be true. For example, damages were awarded to the plaintiff in the Star Chamber according to the value of his goods riotously taken away by the defendant. The plaintiff caused two men to swear the value of his goods that never saw nor knew them; and though that which they swore was true, yet because they knew it not, it was a false oath in them, for which both the prosecutor and the witnesses were sentenced in the Star Chamber (Gurnei's case, Star Chamber, Mich. 9 Jac. 1.), and herewith agreeth Bracton, lib. 4, fol. 289, that a man may swear the truth and yet be perjured. *Dicunt quidam verum et mentiuntur et perjerant eo quod*

said majesty's said court of exchequer at Westminster aforesaid, in a certain cause wherein the said E. II. was plaintiff, and the said A. N. defendant, whereby it was considered by the said court of exchequer, that the said E. II. should recover against the said A. N., as well a certain debt as also certain damages and costs, as by the record thereof still remaining in the said court of exchequer at Westminster more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that after the signing of the said last mentioned judgment, and before and at the time of making of the arrest in this count

contra mentum vadunt, ut si Judeus juraverit Christum natum ex virgine perjurium committit quia contra mentem vadit quia non credit ita esse ut jurat.

"In Oakley and Whitesby's case (in K. B. 20 Jac. I., Palmer's Rep. 294), it was resolved, that it is a misdemeanor and perjury at common law for one to swear without his knowledge, although it may be true; and in 2 Roll. Abr. 77, pl. 5, where this case is abridged, it is laid down that this is a false oath punishable at common law, although it may not be within the statute (5 Eliz. c. 9). In the case of Allen v. Wesley (in C. P., 4 Car. I., Hetley's Rep. 97), it is stated that in Style's case it was agreed by the court 'that although a witness swears the truth, yet, if it be not truth of his own knowledge, as if he shows how one revoked a will by parol in his hearing, when the words were spoken to another in his absence, he does not swear truly, and it is a corrupt oath within the statute.'

"But in the case of Rex v. Hinton, 3 Mod. 122 (in K. B. 2 & 3 Jac. II.), the court says that 'there is a difference where a man swears a thing which is true in fact and yet he doth not know it to be so, and to swear a thing to be true which is really false; the first is perjury before God, the other is an offence of which the law takes notice.'

"Mr. Sergeant Russell says (Russ. on Cr. and Misd. 1st ed. vol. ii. p. 1754, and Mr. Greaves' ed. vol. ii. p. 597), 'with respect to the falsity of the oath, it should be observed, that it has been considered not to be material whether the fact which is sworn be in itself true or false, for howsoever the thing sworn may happen to prove agreeable to the truth or not, yet, if it were known not to be so by him who swears it, his offence is altogether as great as if it had been false, inasmuch as he wilfully swears that he knows a thing to be true, which at the same time he knows nothing of, and impudently endeavors to induce those before whom he swears to proceed upon the credit of a deposition, which any stranger might take as well as he,' and for this the learned sergeant cites 1 Hawk. P. C. c. 69, s. 6 (1 Curw. Hawk. b. 1, c. 37, s. 6), and the case of Rex v. Edwards, *coram* Adams B., Shrewsbury Lent Assizes, 1764, and subsequently considered by the judges (MS.). And in the case of Rex v. Mawbey, 6 T. R. 619, which was an indictment for a conspiracy to pervert the course of justice by producing in evidence a false certificate of magistrates, that a road was in repair, Mr. Justice Lawrence said: 'It is not necessary that the defendants should have known that the road was out of repair; they are charged with conspiring to pervert the course of justice by producing in evidence a certificate that the road was in repair, and if the charge be established in fact, it is an offence of considerable magnitude against the administration of the justice of the country. This is not unlike the case of perjury where a man swears to a particular fact without knowing at the time whether the fact be true or false; it is as much perjury as if he knew the fact to be false, and equally indictable.' We are not aware of any form of indictment in the printed collections for perjury, in swearing that which the party did not know to be true."

mentioned, to wit, on, etc., at, etc., the said A. N. was the occupier of, and did dwell in, a certain dwelling-house there situate, and that there then and there was a certain outer door at the back of the same dwelling-house, and that, shortly before the making of the arrest in this count mentioned, to wit, on the day and year last aforesaid, at the parish last aforesaid, in the county of Gloucester aforesaid, the said G. W. went to the same dwelling-house for the purpose of arresting the said A. N., and did then and there arrest the said A. N. in the same dwelling-house, under and by virtue of a certain other writ of our said lady the queen, commonly called a *capias ad satisfaciendum*, before then issued out of the said court of exchequer at Westminster aforesaid, upon the said last mentioned judgment. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. N. was kept and detained in the said custody of the said sheriff of the said county of Gloucester, under and by virtue of the said last mentioned writ, from the time of making of the said last mentioned arrest until and at and after the time of the making of the affidavit in this count hereafter mentioned, to wit, at the parish of Cheltenham aforesaid, in the county of Gloucester aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. N., contriving and maliciously intending to injure the said E. H., and to deprive him of the means of recovering the said debt, damages, and costs, last aforesaid, afterwards, to wit, on, etc., at, etc., in order to obtain a certain other writ, commonly called a *habeas corpus*, by means whereof he the said A. N. might be discharged out of the same custody of the said sheriff of the said county of Gloucester, as to the said last mentioned execution, on the ground that the last mentioned arrest was illegal, did come in his own proper person before R. G. W., so being a commissioner, etc. (*setting out authority*), and did then and there, to wit, on the day and year last aforesaid, at the North Hamlet last aforesaid, in the county of Gloucester aforesaid, produce to and before the said R. G. W., so being such commissioner as aforesaid, a certain affidavit in writing of him the said A. N.; and that the said A. N. then and there by and before the said R. G. W., so being such commissioner as aforesaid, was duly sworn and did take his corporal oath upon the holy gospel of God, of and concerning the truth

of the matter contained in the same affidavit (he the said R. G. W. then and there having sufficient and competent power and authority to administer the same oath to the said A. N. in that behalf). And the jurors aforesaid, upon their oath aforesaid, do further present, that at and upon the making of the same last mentioned affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge that, on the occasion when the said G. W. so went to the same dwelling-house as in this count mentioned, the said G. W. did, by great force and violence, or in any other manner, succeed in bursting open the said outer door at the back of the same dwelling-house; and that at and upon the making of the same affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge that the said G. W., on the same occasion last aforesaid, burst open the same door; and that at and upon the making of the same affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge that the said G. W., on the same occasion last aforesaid, did, by great force and violence, or in any other manner, succeed in breaking away the lock-fastenings of the same door; and that at and upon the making of the same affidavit, it then and there became and was a material question, whether the said A. N. then knew of his own knowledge that the said G. W., on the same occasion last aforesaid, did break away the lock-fastenings of the same door. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. N. so being sworn as last aforesaid, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, did, on, etc., at, etc., in, etc., in and by his said affidavit last aforesaid, upon his oath last aforesaid, before the said R. G. W., so being such commissioner as aforesaid, and having such competent power and authority as aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously depose and swear, amongst other things, in substance and to the effect following, that is to say, that he (meaning the said G. W.) then went round to the door of the back kitchen of this deponent's (meaning the said A. N.'s) dwelling-house (meaning the same dwelling-house as aforesaid), which is the only outer door of the same, and had been locked and well

secured all the said day, and the key kept by deponent's (meaning the said A. N.'s) said wife; and that, by great force and violence, the said G. W. (meaning the said G. W.) succeeded in breaking away the lock-fastenings of the said outer door, and in bursting open the said outer door; thereby meaning that he the said A. N. knew of his own knowledge, at the time of the making of the same last mentioned affidavit, that the said G. W. did, on the occasion aforesaid, when the said G. W. went to the same dwelling-house, as in this count aforesaid, by great force and violence, succeed in breaking away the lock-fastenings of the said outer door at the back of the same dwelling-house, and in bursting open the same outer door; and that the said G. W. did, on the same occasion, break away the same fastenings and burst open the same door; whereas, in truth and in fact, the said A. N. did not, at the time of making the said last mentioned affidavit, or at any other time, know of his own knowledge that the said G. W., on the same occasion last aforesaid, did by great force and violence, or in any other manner, succeed in breaking away the same lock-fastenings of the same outer door. And whereas, in truth and in fact, the said A. N. did not, at the time of making the said last mentioned affidavit, or at any other time, know of his own knowledge that, on the same occasion last aforesaid, the said G. W. did, by great force and violence, or in any other manner, succeed in bursting open the same outer door of the same dwelling house. And whereas, in truth and in fact, the said A. N. did not, at the time of the making of the said last mentioned affidavit, or at any other time, know of his own knowledge that the said G. W. did, on the same occasion last aforesaid, break away the same fastenings of the same outer door. And whereas, in truth and in fact, the said A. N. did not, at the time of the making of the said last mentioned affidavit, or at any other time, know of his own knowledge that the said G. W. did, on the occasion last aforesaid, burst open the same outer door. And the jurors aforesaid, upon their oath aforesaid, do further present, that all the said several matters and things so alleged to have been falsely sworn by the said A. N., as in this count aforesaid, were and each of them was material for obtaining the said last mentioned writ of *habeas corpus*, and for obtaining the discharge of the said A. N. from the said last mentioned

custody of the said sheriff of the said county of Gloucester, to wit, at the parish of Cheltenham aforesaid, in the said county of Gloucester. And so the jurors aforesaid, upon their oath aforesaid, do say; that the said A. N., on the said, etc., before the said R. G. W., so being such commissioner as aforesaid, and so having such competent power and authority as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form last aforesaid, did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our said lady the queen, and against, etc. (*Conclude as in book 1, chapter 3.*)

(592) *For perjury, in an answer sworn to before a master in chancery.*(k)

That C. D., of, etc., heretofore, to wit, on, etc., at, etc., did exhibit his bill of complaint in writing against one E. F. therein described, of said B., yeoman, in the supreme judicial court of this commonwealth, begun and held at W., within and for the county of W., on the Tuesday of in the year of, etc.; and the said C. D., in and by his said bill of complaint, among other things, stated and alleged in substance, and to the effect following, to wit (*here insert that part of the bill concerning which the perjury was committed*), as in and by the said bill of complaint of the said C. D. remaining filed of record in the said supreme judicial court, amongst other things, more fully appears. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. F., the defendant in the said bill of complaint, afterwards, that is to say, on the day of, etc., at said B., in the county of S., did come in his own proper person, before G. H., Esq., then and there being one of the masters in chancery of the said supreme judicial court, and then and there did exhibit and produce to the said G. H., Esq., the answer in writing of him the said E. F. to the said bill of complaint of the said C. D., entitled, "The answer of E. F., the defendant, to the bill of complaint of C. D., complainant;" and the said E. F. was then and there sworn in due form of law, and took his corporal oath, touching and concerning the matters

contained in his said answer by and before the said G. H., Esq., he the said G. H. so then being one of the masters in chancery in the said supreme judicial court, and then and there having sufficient and competent power and authority to administer an oath to the said E. F. in that behalf; and that the said E. F., being so sworn as aforesaid, and being then and there lawfully required to declare and depose the truth in a proceeding in a court of justice, did, upon his oath aforesaid, concerning the matters contained in his said answer before the said G. H., Esq., then as aforesaid being one of the masters in chancery of the said supreme judicial court, then and there swear, that so much of the said answer of him the said E. F., as related to his own acts and deeds, was true; and that the said E. F., being so sworn as aforesaid, intending unjustly to aggrieve the said C. D., the said complainant as aforesaid, in his answer aforesaid, before the said G. H., Esq., he being then as aforesaid one of the masters in chancery in the said supreme judicial court (and having sufficient and competent authority as aforesaid), falsely, knowingly, wilfully, and corruptly, by his own act and consent, upon his oath aforesaid, did answer, swear, and affirm, amongst other things, in substance as follows, that is to say, : "And this defendant (meaning himself the said E. F.) says" (*here insert verbatim that part of the answer relative to and comprising the part in which the perjury is alleged to have been committed*), as by the said answer of him the said E. F. still remaining in the supreme judicial court aforesaid, at B. aforesaid, in the county of S. aforesaid, amongst other things will appear; whereas in truth and in fact (*then go on to negative the answer in the words of it, and in every part of it which is alleged to be false*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said E. F. falsely and wickedly, wilfully and corruptly, in manner and form aforesaid, did commit wilful and corrupt perjury, to the great damage of him the said C. D.; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(592a) *Perjury in false swearing by jurymen as to qualifications.*

That heretofore, to wit, at the November term of the Boone circuit court, in and for, etc., in the year, etc., on, etc., at the said county of Boone, etc., before the Hon. C. N. P., judge, etc.,

and the then acting judge, etc., by appointment from the Hon. T. H. P., the *ex-officio* judge of, etc., a certain issue between the state of Indiana and E. A. and P. A., in a certain suit on an indictment for grand larceny, wherein the state of Indiana was plaintiff, and the said E. A. and P. A. were defendants, came on to be tried in the B. circuit court, in, etc., in due form of law, the said court then and there having competent authority in that behalf; that for the purpose of trying the issue so joined in said suit as aforesaid, upon said indictment charging the said E. A. and P. A. with the crime of grand larceny, a jury consisting of G. W. S., etc., twelve lawful men, freeholders or householders of B. county, etc., were called and sworn, and took their corporal oath before the said court, which oath was then administered to the said jurors aforesaid by one L. L., who was the regularly appointed, qualified, and acting deputy-clerk of the said B. circuit court, the said court and the said L. L. then and there having competent authority in that behalf, that they would true answers give to such questions as were asked them, touching their competency to act as jurors in said cause so pending; that, at and upon the examination of the said jurors aforesaid, touching their competency to serve as jurors on the trial of said cause aforesaid, it then and there became and was a material question whether one A. L. H., one of the said jurors called and sworn as aforesaid, had formed or expressed an opinion as to the guilt or innocence of the said E. A. and P. A. of said crime of grand larceny, defendants in said suit as aforesaid, who were then and there about to be placed upon trial on said indictment, then and there and therein charging and presenting them with the crime of grand larceny as aforesaid; and the said A. L. H., one of said jurors aforesaid, then and there, on the examination of said jurors aforesaid, touching their competency to serve as jurors on the trial of said cause as aforesaid, upon his oath aforesaid, feloniously, wilfully, corruptly, and falsely, before the court aforesaid, did depose and swear in substance and to the effect following, that is to say, that he, the said A. L. H., had not *formed* or *expressed* an opinion as to the guilt or innocence of the said E. A. and P. A. of said crime of grand larceny, of which they then stood charged, and on which charge they were then about to be placed on trial; whereas, in truth

and in fact, the said A. L. H., one of the said jurors as aforesaid, had, previous to the time of his being called and sworn as a juror in said cause as aforesaid, and in the presence of and to J. I., I. I., S. I. G., and divers other persons whose names to the grand jurors are unknown and cannot be given, expressed an opinion as to the guilt or innocence of the said E. A. and P. A., of said crime of grand larceny as aforesaid, by then and there stating, to and in the presence of said J. I., I. I., S. I. G., and said divers other persons whose names are unknown and cannot be given, that he, the said A. L. H., did not believe and never did believe, that the said E. A. and P. A. were guilty of said crime of grand larceny, of which they stood charged, and for which said offence they were then about to be placed on trial; whereas, in truth and in fact, the said A. L. H. had, previous to the time of his being called and sworn as a juror in said cause as aforesaid, formed an opinion as to the guilt or innocence of the said P. A. and E. A., of said crime and charge of grand larceny, with which they stood charged, and for which said offence they were then about to be placed on trial; and so the jurors aforesaid, upon their oath aforesaid, do say that the said A. L. H., on, etc., at, etc., and before the B. circuit court aforesaid, did, in manner and form aforesaid, feloniously, wilfully, corruptly, and falsely commit wilful and corrupt perjury, contrary to the form of the statute, etc.(l) (*Conclude as in book 1, chapter 3.*)

(l) Howk, C. J. We have no brief or argument of this cause from the appellee, in this court; and, therefore, our only information in regard to the grounds of the decision of the circuit court, in quashing the indictment, is derived from the brief of the appellant's counsel. We learn therefrom, that the indictment was quashed because its allegations "were not sufficient to show that the defendant, H., had expressed an opinion." If this was the ground on which the court quashed the indictment, it is very clear, we think, that the decision was erroneous, and cannot be sustained. For it was fully, clearly, and explicitly alleged in the indictment, that the appellee had expressed the opinion to, and in the presence of, divers persons, some of whom were named, and others whose names were unknown, that he did not believe and never did believe, etc. . . .

In section 61 of the criminal code, it is expressly provided, that no indictment or information shall be quashed or set aside for any defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits. 2 R. S. 1876, p. 386.

After a careful and thorough examination of the indictment in this cause, we are satisfied that there is no defect or imperfection therein, which would "tend to the prejudice of the substantial rights of the defendant upon the merits." Indeed it seems to us that the indictment in this case is remarkably free from

(593) *Before a grand jury.*(m)

That heretofore, to wit, at the general quarter sessions of the peace of our sovereign lady the queen, held at the shire hall in Shrewsbury, in and for the county of Salop, on Monday in the first week after the twenty-eighth day of December, to wit, on, etc., before the honorable T. K., Sir B. L., baronet, J. A. L., Esq., and others their associates, her majesty's justices, assigned to keep the peace in the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdemeanors in the same county done and committed, a certain bill of indictment against T. H., late of the parish of Whitechurch, in the county of Salop, laborer, and F. P., wife of R. P., laborer, late of the parish of Whitechurch, in the county aforesaid, was then and there in due form of law, exhibited to (*naming the grand jurors*), good and lawful men of the said county of Salop, then and there sworn and charged to inquire for our said lady the queen, and the body of the said county; which said bill of indictment then and there was as followeth, that is to say (*setting out the indictment verbatim, which was against T. H. for stealing three tablecloths, the property of R. H., and against F. P. for receiving them knowing them to have been stolen*).

And the jurors first aforesaid, upon their oath aforesaid, do further present, that, to wit, on, etc., at, etc., and before the said good and lawful men, who were so sworn and charged to inquire as aforesaid, had the said bill of indictment exhibited to them as aforesaid, and before the said good and lawful men had inquired as by law they ought to do, touching the matters stated and mentioned in the said bill of indictment, and touching the truth of the matters stated and contained in the said bill of indictment, M., the wife of R. H., late of the parish of Whitechurch, in the county of Salop, laborer, appeared before the court of general quarter sessions of the peace holden as aforesaid before the said justices, and the said others their associates as aforesaid, as a witness in support of the said bill of indictment, and was

defects or imperfections, technical or otherwise, and that it will constitute a good precedent for drafting indictments in similar cases. *State v. Howard*, 63 Ind. 502.

(m) *R. v. Hughes*, 1 C. & K. 519; verdict, not guilty. See also *Com. v. Parker*, 7 Cushing, 212; and for form in latter case, *Tr. & H. Prec.* 435.

then and there, at the said general quarter sessions of the peace holden as last aforesaid before the said justices, and the said others their associates, duly sworn, and took her corporal oath, upon the holy gospel of God, before the said honorable T. K., Sir B. L., baronet, J. A. L., Esq., and the said others their associates, so being such justices aforesaid, at the said general quarter sessions of the peace holden as aforesaid, that the evidence that she the said M. H. should give before the grand jury (meaning before the said good and lawful men so sworn and charged as aforesaid to inquire as aforesaid), on the said bill of indictment, should be the truth, the whole truth, and nothing but the truth (they the said honorable T. K., Sir B. L., baronet, J. A. L., Esq., and the said others their associates so being such justices as aforesaid, at the said general quarter sessions of the peace holden as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said M. H. in that behalf).

And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the parish of St. Chad, in the borough of Shrewsbury, in the said county of Salop, the said good and lawful men being so sworn and charged as aforesaid to inquire as aforesaid, did in due form of law, and according as they were so sworn and charged as aforesaid, inquire touching the matters and touching the truth of the matters stated and contained in the said bill of indictment so exhibited to them as aforesaid.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that upon the said inquiry, by and before the said good and lawful men so as aforesaid sworn and charged to inquire as aforesaid, it then and there became and was a material question, whether three table-cloths which were then and there produced before the said good and lawful men, were the property of R. H., the husband of the said M. H., and that upon the said inquiry it then and there also became and was a material question, whether the said three table-cloths were the property of the said T. H.; and that upon the said inquiry it then and there became and was a material question, whether the said three table-cloths had at any time belonged to the mother of the said M. H.; and that upon the said inquiry it then and there became and was a material question, whether the said three table-cloths had at

any time been the property of the said T. H.; and that upon the said inquiry it then and there became and was a material question, whether the said three table-cloths had at any time been the property of the said R. H.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year first aforesaid, at the parish of St. Chad, in the borough of Shrewsbury aforesaid, in the county of Salop, the said M. H., being so sworn as aforesaid, contriving and intending to pervert the due course of justice, went before the said good and lawful men so sworn and charged as aforesaid to inquire as aforesaid, and before the said good and lawful men, upon the said inquiry by and before the said good and lawful men, touching the matters and touching the truth of the matters stated and contained in the said bill of indictment, and that she the said M. H., then and there upon her oath aforesaid, falsely, corruptly, knowingly, wilfully, and maliciously, before the said good and lawful men so sworn and charged as aforesaid to inquire as aforesaid, upon the said inquiry did depose and swear amongst other things, in substance and to the effect following, that is to say, that the three table-cloths which were then and there, to wit, at the time and place last aforesaid, produced, then were her son's (meaning were the property of the said T. H.), and that the said table-cloths had belonged to the mother of the said M. H., and were to be divided amongst her the said M. H.'s children, of whom the said T. H. was one; whereas, in truth and in fact, the said table-cloths then were not her the said M. H.'s son's, as she the said M. H. then and there well knew; and whereas, in truth and in fact, the said table-cloths were not then the property of the said T. H., as she the said M. H. then and there well knew; and whereas, in truth and in fact, neither of the said table-cloths ever had been the property of the said T. H.; and whereas, in truth and in fact, the said table-cloths then were the property of the said R. H., as she the said M. H. then and there well knew; and whereas, in truth and in fact, the said table-cloths and each of them were, at the time last aforesaid, and for twenty years and more before that time, the property of the said R. H., as she the said M. H. then and there well knew; and whereas, in truth and in fact, the said table-cloths never did belong to

the mother of the said M. H., as she the said M. H. then and there well knew; and whereas, in truth and in fact, the said table-cloths were not to be divided amongst the children of the said M. H.; and whereas, in truth and in fact, the mother of the said M. H. was a married woman at the time of the death of her the said mother, and had been so for twenty years and more before the time of her said death; and the said T. H. and the other children of the said M. H. were not born at the time of the decease of the said M. H.'s mother, as she the said M. H. then and there well knew.

And so the jurors first aforesaid, upon their oath aforesaid, do say, that on the said, etc., at, etc., before good and lawful men so sworn and charged as aforesaid to inquire as aforesaid, upon their inquiry aforesaid touching the matters and touching the truth of the matters stated and contained in the said bill of indictment, by her own act and consent, and of her own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, in contempt of our lady the queen and her laws, to the evil example of all others in like case offending, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(593a) *Perjury before grand jury. Form sustained in Illinois. After averring the nature of the issue before the grand jury proceed:*

That upon said investigation it became and was a material question whether the said J. K., on, etc., had deposited in the bank of said C. M. W., at, etc., the sum of \$525.71 in county orders, in the name of N. M. K.; and thereupon the said J. K., having then and there so sworn as aforesaid, did then and there, to wit, on the investigation of said charge before the grand jurors and grand jury aforesaid, wilfully, maliciously, feloniously, wickedly, and corruptly and falsely depose, swear, and give in evidence, among other things, in substance as follows, to wit, that on or about, etc., he, the said J. K., deposited in the bank of C. M. W. in, etc., a package containing \$525.71 in county orders, in the name of his wife, N. K.; whereas, in truth and in fact, the said J. K. did not, on, etc., or on any other day, deposit in the bank of W. in, etc., or in any other place in U.

county, etc., or elsewhere, a package containing \$525.71 in county orders, or any other kind of funds, in the name of N. K., or in any other person's name. And so the jurors aforesaid, upon their oaths aforesaid, do say, that the said J. K., on, etc., at, etc., before the grand jurors and the grand jury aforesaid, their said foreman, J. D. B., aforesaid, having lawful power and authority as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, feloniously, maliciously, and corruptly did commit wilful and corrupt perjury, etc.(n) (*Conclude as in book 1, chapter 3.*)

(593b) *Perjury on a hearing on habeas corpus.*

The jurors of, etc., do on their oath present, that heretofore, to wit, on, etc., the Hon. W. M., associate judge of the circuit court for, etc., by the authority vested in him by the constitu-

(n) "The first objection made to the indictment is, that facts are not averred showing that C. M. W. sustained any fiduciary relation to the defendant, and hence the testimony of the defendant before the grand jury, to the effect that he did not get back from the bank the same amount of county orders that he deposited, was immaterial, and would not amount to perjury.

"We do not understand that the authorities required the pleader to set out minutely in the indictment the transaction between the defendant and W. In 2 Russell, 639, it is said, 'It is necessary that it should appear on the face of the indictment that the oath taken was material to the question depending. But it is not necessary to set forth in the indictment so much of the proceedings of the former trial as will show the materiality of the question on which the perjury is assigned; it will be sufficient to allege generally that the particular question became a material question.' See also 2 Chitty Criminal Law, 307; Pollard v. People, 69 Ill. 148.

"In the indictment, while the facts and circumstances under which the defendant deposited money with W. are not detailed, yet it is alleged that it became and was a material question, on the trial of the charge of embezzlement against W. before the grand jury, whether defendant had deposited \$525.71 with the said W. This we regard as sufficient, without a statement of the facts showing wherein the matter sworn to was material.

"It is also contended that the indictment is bad because it makes the precise sum sworn to have been deposited material. Under the facts as proven, had the indictment been drawn otherwise, no conviction could have been sustained. The testimony of the defendant before the grand jury in substance was, that he had deposited with W. a package containing \$525.71 in county orders; and that, while the package was in W.'s custody, it had been opened and a certain amount of the county orders taken out and retained when the package was returned. Whether this statement was true or false depended upon the amount the package contained when it was deposited, and hence the necessity of the averment as made in the indictment.

"It is also said the indictment is defective, as it does not set out a full description of the county orders. We are aware of no authority that required a description of the county orders to be given in the indictment, nor do we perceive any necessity for setting out the orders in the indictment." Kimmel v. People, 92 Ill. 457.

tion and laws of the said state, upon the petition and application of a certain J. C. M., ordered that the state's writ of *habeas corpus* issue out of the said, etc., court, directed to R. C. B., the sheriff of the said county, commanding him, the said sheriff, to produce the body of the said J. C. M., held in confinement by him, together with the cause of the detention of him, the said J. C. M., and that the said writ of *habeas corpus* be returned immediately at the basement of the M. E. Church, in H., before the Hon. W. M., associate judge, as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said writ of *habeas corpus* did issue, as ordered by the said judge, directed to the said R. C. B., sheriff, as aforesaid; and the said sheriff, according to the exigency of the said writ, did produce the body of the said J. C. M., with the cause of his detention and confinement, before the said W. M., associate judge, etc., at the basement of the said M. E. Church, in, etc., on, etc.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. C. M., produced as aforesaid, by the sheriff aforesaid, before the Hon. W. M., etc., did, on his own behalf and by his counsel, plead that he, the said J. C. M., did commit no offence, and that there was no sufficient legal cause for his detention and confinement by the said sheriff as aforesaid; and that the said judge did then and there, to wit, on, etc., inquire into the legality, cause, and propriety of the confinement and detention of the said J. C. M., as aforesaid.

And the jurors aforesaid, upon their oath aforesaid, do further present, that while the said judge was inquiring into the legality, cause, and propriety of the confinement and detention of the said J. C. M., as aforesaid, one J. C. D., late of, etc., yeoman, did then and there, to wit, on, etc., at, etc., appear before the said judge as a witness in support of the legality of the said confinement and detention of the said J. C. M., and did then and there before the Hon. W. M., etc., in due form of law, solemnly and sincerely declare and affirm, that the evidence that he, the said J. C. D., should give in the matter depending before the court (the legality and propriety of the confinement and detention of the said J. C. M. as aforesaid, then and there depending before the said judge and court), should be the truth, the whole truth, and nothing

but the truth (he, the said Hon. W. M., judge, as aforesaid, then and there having sufficient and competent authority to administer the said affirmation to the said J. C. D. in that behalf); and the said J. C. D., having affirmed as aforesaid, then and there, to wit, on, etc., at, etc., to prevent the said judge of the said court from knowing the truth, and to continue the imprisonment and detention of the said J. C. M., did upon his affirmation, in answer to the questions propounded to him in the matter then and there depending before the said judge of the said court (the said judge of the said court having then and there sufficient and competent authority to administer an affirmation to the said J. C. D., and to propound, and to permit to be propounded questions on that behalf to him), then and there wilfully, falsely, corruptly, and knowingly, by his own act and consent, commit perjury upon his affirmation, in saying, deposing, affirming, and declaring in answer to the questions propounded as aforesaid (amongst other things) in substance to the effect following, that is to say, that the said J. C. M., D. W. (here follow additional names), five or six weeks ago (meaning five or six weeks before the time of making said affirmation), on one night, about nine or ten o'clock, did enter together into the saloon of D. W., kept in the house of J. P., and having entered the said saloon as aforesaid, some one of the above-named persons in the said saloon said, "Let us break down D., let us swear against him;" and that the others of the above-named persons agreed and assented to the same, and that they did then and there enter into a conspiracy against him, the said J. C. D.; whereas, in truth and in fact, the said J. C. M., D. W. (*names*) did not enter together into the saloon of D. W., kept in the house of the said J. P., at the time alleged by the said J. C. D. in his said affirmation, or at any other time; and whereas, in fact and in truth, the above-named persons were not together in the said saloon, nor did any one of them say to the others, "Let us break D. down, let us swear against him;" nor did they or any of them, then and there, give any assent to the same, or agree to do the same, or enter into a conspiracy against him, the said J. C. D.

And the jurors aforesaid, upon their oath aforesaid, do further present, that it then and there became necessary and material the said judge of the said court should know whether the said

J. C. M. (*names*) did enter together the saloon five or six weeks before the making of the said affirmation by the said J. C. D., and whether, having entered as aforesaid, they did then and there, in the said saloon, agree to break down D., and swear against him, and did then and there enter into a conspiracy against him.

And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. C. D., on, etc., at, etc., before the said judge of the said court (he, the said judge, then and there, having sufficient and competent authority as aforesaid), upon his solemn affirmation aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in a matter depending before the said judge of, etc., did wilfully, corruptly, falsely, and knowingly commit perjury, contrary, etc.(o) (*Conclude as in book 1, chapter 3.*)

(594) *In answer to interrogatories exhibited in chancery.*(p)

That one C. D. heretofore, to wit, on did exhibit certain interrogatories, in writing, in the supreme judicial court of this commonwealth begun and holden at B., within and for the county of S., on, etc., in a certain case before that time commenced by bill of complaint, and then pending and at issue in the same court, after certain pleadings and proceedings had been had therein; in which said suit one E. F. was complainant, and the said C. D. was respondent, in order that the said interrogatories might be administered, according to the course and practice of the said court in its chancery jurisdiction, to certain witnesses to be produced, sworn, and examined in the said cause, on the part and behalf of the said C. D., the said defendant therein, touching and concerning a certain written paper, purporting to contain an agreement for the lease of a certain house and premises therein mentioned, from the said E. F. to the said C. D.; and that it became and was a material question in the said cause between the said parties, and to be deposed to by the said witnesses in answer to the said interrogatories, whether the said E. F. had declared that he would release the said C. D. from the said agreement, or had released him from the performance thereof; and in and by one of the interrogatories

(o) The above indictment sustained in *Deckard v. State*, 38 Md. 186.

(p) Altered by Mr. Davis, *Proc.* 202, from *Chit. C. L.* 397.

exhibited as aforesaid, the said witnesses were interrogated as follows, that is to say (*here copy the interrogatories with necessary innuendoes*). And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., of in the county of yeoman, and one of the witnesses to whom the interrogatories in the said cause were to be, and were accordingly, afterwards, to wit, on, etc., at, etc., administered, then and there came in his own proper person before the said supreme judicial court, and having seen and understood the said interrogatories, so exhibited in the said court as aforesaid, then and there, before I. P., Esq., chief justice of the said supreme judicial court, he the said I. P., Esq., as chief justice as aforesaid, then and there having sufficient and competent power and authority to administer an oath to the said G. H. in that behalf, was duly sworn before the said court by the said I. P., Esq., chief justice as aforesaid; and the said G. H. then and there, on his said oath before the said court, being then and there required to depose the truth in a proceeding in a course of justice, did swear that he would make true answers to all such questions as should be asked him by the said court or their order, upon the interrogatories aforesaid, at the time of his examination, and that he would speak the truth, the whole truth, and nothing but the truth, without favor or affection to the said parties in the said cause; and that the said G. H. afterwards, to wit, on the day of was duly examined in the said court upon the said interrogatories; and that the said G. H. intending unjustly to aggrieve the said E. F., the complainant aforesaid, did then and there, in his answer to the said fourth interrogatory, falsely, knowingly, wilfully, and corruptly, by his own act and consent, amongst other things, answer, swear, and affirm, in writing, as follows, that is to say (*here state the answer with necessary innuendoes*), as by the said answer of the said G. H. to the said fourth interrogatory remaining filed in the court aforesaid, will, amongst other things, fully appear; whereas, in truth and in fact (*then go on to negative the answer in all its parts, comprehending what is alleged to be false*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H. then and there, knowingly, wickedly, falsely, wilfully, and corruptly, in manner and form aforesaid, did commit

wilful and corrupt perjury, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(595) *Perjury on motion for new trial.*

The jurors for the commonwealth, etc., on their oath present, that, at a term of the superior court begun and holden on, etc., at, etc., holden for the transaction of criminal business at B., within and for said county of S., to wit, on, etc., in the year aforesaid, one J. F. C. duly filed his motion in writing in said court, praying for a new trial to be granted him, said C., upon this ground, among others: of evidence therein set forth by affidavits, and alleged to be then newly discovered, upon a certain indictment then pending in said court, charging him, said C., in several counts, with the crime of forgery, and of knowingly uttering forged bonds; upon all the counts of which said indictment said C. had lately, to wit, within one year theretofore, been duly tried and found guilty by a jury of the county, but upon which indictment no sentence had then been passed, nor judgment given; that thereafter, to wit, on, etc., in the year aforesaid, said motion was duly heard by and before the Hon. W. C., one of the justices of said court, at his chambers, at said B.; that at said hearing it became, and was, a material matter of inquiry, whether one E. McL. had written on the twentieth day etc., or at any other time in said year last named, the words "Edward McLaughlin," upon a certain book, called a hotel register, produced at said hearing, and then exhibited to said McL., and whether he, said McL., in said last named year, saw any one, and if so, whom, write upon said book, at a certain inn in said B., called the N. E. House, the words "William P. Schell," appearing upon said book, and then viewed at said hearing by said McL. (he being present thereat); and that at said hearing, before said justice, at B. aforesaid, on said second day of, etc., said E. McL., of said B., offered himself as a witness in said hearing, in behalf of said C., and was then and there duly sworn by said justice to testify the truth, the whole truth, and nothing but the truth, in the matter aforesaid then in hearing; and that said McL., being so sworn as aforesaid, did then and there knowingly, falsely, wilfully, and corruptly testify and say, in substance, as follows, that is to say: that in the said year

last mentioned, he, said McL., was in said N. E. House, with one F. H., of said B., and that he, said McL., at said inn, wrote in said book the words "Edward McLaughlin," and that at said time and place, when and where he, said McL., wrote said words "Edward McLaughlin," he, said McL., saw said F. H. write said words "William P. Schell," upon said book, immediately before he, said McL., wrote his name thereon. Whereas, in truth and in fact, neither said H. nor said McL. were in said inn together at any time, and said H. did not write at any time said words "William P. Schell;" all of which the said McL., at the time he so deposed and swore as aforesaid, then and there well knew. And so the jurors aforesaid, upon their oath aforesaid, do present and say, that the said McL., on, etc., before said justice, having full power and authority, as aforesaid, in manner and form aforesaid, did commit wicked and wilful perjury, against the law, etc.(q) (*Conclude as in book 1, chapter 3.*)

(596) *Falsely charging the prosecutor with bestiality at a hearing before a justice of the peace.*(r)

That R. G., etc., on, etc., wickedly and maliciously intending to aggrieve one A. B., etc., on, etc., came before A. T. R., Esq., then and yet being one of the justices of our lady the queen, assigned to keep the peace of our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, the

(q) Sustained in *Com. v. McLaughlin*, 122 Mass. 449.

(r) *R. v. Gardener*, 8 C. & P. 737. An arrest of judgment was moved for on three grounds: 1st. That the indictment did not sufficiently show any judicial proceeding pending before the magistrate, and that it ought to have averred in direct terms that a charge was pending, and on this point he cited the case of *Rex v. Pearson*, 8 C. & P. 321. 2d. That the flap of the trousers being unbuttoned, or even the existence of any flap, did not appear on the face of the indictment to be material, and that there was no sufficient averment of materiality; and 3d. That the assignment of perjury on the main charge was too large, because it denied all animals, all times and all places, and he submitted that although it was not necessary to prove every assignment of perjury contained in a count, yet that the proof of part of any one assignment of perjury would not be sufficient. Mr. Justice Patteson reserved the points for the consideration of the fifteen judges.

In the ensuing term, the case was considered by the judges on all the points made at the trial, when they held the conviction right; and they were unanimously of opinion that the indictment sufficiently showed that there was a legal proceeding pending before the magistrate, and that the averment of materiality as to the state of the dress was sufficient.

said A. T. R., Esq., then and there having a lawful power and authority to administer the oath and to receive the information hereinafter mentioned, and then and there before the said justice was in due form of law sworn, and took his corporal oath upon the holy gospel of God, the said justice having such lawful power and authority as aforesaid to administer the said oath to the said R. G. in that behalf, and to receive the information hereinafter mentioned, and that the said R. G., being so sworn as aforesaid, not having the fear of God before his eyes, but, etc., then and there before the said justice (he the said justice having then and there the power and authority as aforesaid), falsely, corruptly, wilfully, and maliciously did say, depose, swear, charge, and give the said justice to be informed, that the said A. B., upon a certain day, to wit, on the ninth day of July, in the year aforesaid, in the county aforesaid, then and there had a venereal affair with a certain animal called a donkey, and that the said A. B. then and there, against the order of nature, carnally knew the said donkey, and then and there feloniously and against the order of nature did commit and perpetrate that detestable and abominable crime of buggery with the said donkey; and further (it being then and there material to the inquiry into the said charge and information to know the state of the said A. B.'s dress at the time the alleged offence was so charged to be committed as aforesaid), that the said R. G. then and there saw that the said A. B. then and there had the flap of his the said A. B.'s trousers unbuttoned and hanging down, and that he the said R. G. then and there saw the inside of the said flap; whereas, in truth and in fact, the said R. G. did not then and there, or at any time, or in any place, see the said A. B., nor was the said A. B. at any time in the act of having a venereal affair with a donkey, or with any other animal whatsoever, nor did the said A. B. then, or at any time, or in any place, or in any manner, commit, nor was the said A. B. at any time, or in any place, or in any manner, in the act of committing that detestable and abominable crime of buggery; and whereas, in truth and in fact, the said R. G. did not then and there see the flap of his the said A. B.'s trousers unbuttoned or hanging down, nor was the flap of the said A. B.'s trousers then and there unbuttoned or hanging down, nor did the said R. G. then and there see the

inside of the flap of the said trousers. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said R. G., on, etc., before the said justices, then and there having such power and authority as aforesaid, by his own act and consent, and of his own most wicked and corrupt mind, in manner and form aforesaid, falsely, wickedly, wilfully, and corruptly did commit wilful and corrupt perjury, to the great displeasure of Almighty God, in contempt of our lady the queen and her laws, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(597) *Subornation of perjury in a prosecution for fornication, etc.(s)*

That C. B., late of the said city, yeoman, being a wicked and evil disposed person, minding and intending great injury to one J. L., a good and valuable citizen of the said commonwealth, and unjustly to cause and procure him the said J. L. to be put to great charge and expense of his moneys, and to give security for the maintenance of a child, of which one C. S., spinster, was, on, etc., pregnant, and which by the laws of this commonwealth was likely to become a bastard, did on the same day and year aforesaid, at the city aforesaid, and within the jurisdiction of this court, unlawfully and wickedly solicit, instigate, and as much as in him the said C. B. lay, endeavor to persuade the said C. S. to go before M. H., Esq., then and there being one of the aldermen of the city of Philadelphia, and then and there to take her corporal oath and swear before the said M. H., Esq. (the said M. H., Esq., then and there having sufficient and competent authority to administer the said oath to the said C. S. in that behalf), among other things in substance and to effect following, that is to say, that J. L., a seaman, was the father of a bastard child, of which she the said C. was then pregnant. And the said C. S. did accordingly, and in pursuance of the solicitation, instigation, and persuasion of the said C. B., then and there go before the said M. H., Esq., then and there being one of the aldermen of the said city of Philadelphia, and did then and there take her corporal oath and swear before the said M. H., Esq. (he the said M. H., Esq., then and there having sufficient and competent

(s) This indictment was found and sustained in Philadelphia quarter sessions, in 1801. See *post*, 605.

power and authority to administer the said oath to the said C. S. in that behalf), among other things in substance and to the effect following, that is to say, that she the said C. was then pregnant with child, which child when born would be a bastard, and like to become chargeable to the public, and that the aforesaid J. L., a seaman, was the father of the said child ; whereas, in truth and in fact, he the said C. B., at the time when he so endeavored to persuade, solicit, and instigate the said C. S. to make oath and swear as aforesaid, then and there well knew that he the said J. L. would be put to great charge and expense of his moneys if the said C. would swear as aforesaid ; and whereas, in truth and in fact, he the said C. B., at the said time when he so endeavored to persuade, solicit, and instigate the said C. S. to make oath and swear as aforesaid, had no reasonable or probable cause whatsoever to suspect or imagine that the said J. L. was the father of such child, but on the contrary thereof the said C. B. was then and there informed by the said C. S. that he the said C. B. was the father of such child, of which she the said C. was so pregnant as aforesaid ; and whereas, in truth and in fact, she the said C. never told or informed the said C. B. that the said J. L. was the father of such child ; and whereas, in truth and in fact, he the said C. B. so wickedly and unlawfully endeavored to persuade, solicit, and instigate the said C. S. to swear as aforesaid, in order that he the said C. B. might be exonerated, freed, and discharged from divers expenses which might accrue to him, as being the father of such child, after the same should be born of the body of her the said C. S., in contempt of the laws of this commonwealth, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(598) *Subornation of perjury on a trial for robbery, where the prisoner set up an alibi.*(t)

That at the supreme judicial court of said commonwealth, holden at, etc., on, etc., before the justices of said supreme judicial court, a certain indictment was presented and returned in due course of law by the grand jury for the said county against one A. B., in the form following, to wit (*here insert the*

(t) Chit. C. P. 478, 479 ; Davis's Prec. 220. To constitute this offence the perjury must have been consummated. Wh. Cr. L. 8th ed. § 1329.

indictment); and that afterwards such proceedings were had, as that the said A. B. was duly and legally arrested and brought into said court, and being duly and legally arraigned upon said indictment, pleaded to the same that he was not guilty thereof; upon which issue, such proceedings were had, that afterwards, to wit, at the said supreme judicial court, so held as aforesaid, a trial was had and held by the jury aforesaid, between the said commonwealth and the said A. B. upon the said indictment; upon which said trial, evidence was given on behalf of said commonwealth against the said A. B., that the felony and robbery, in the said indictment specified and charged, was committed by the said A. B., on at And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., late of being a person of an evil and wicked mind and disposition, and devising and intending as much as in him lay to pervert the due course of law and justice, and to cause and procure the said A. B. to be entirely acquitted of the said felony and robbery charged on him by the said indictment, and to escape unpunished for the same, did, before the said trial, to wit, on at unlawfully and wickedly solicit, incite, and endeavor to persuade one E. F. to appear as a witness on the said trial so as aforesaid had, for and on behalf of the said A. B., and on the said trial, falsely to depose, say, and give evidence upon his oath to the court and jury aforesaid, that the said A. B. (*here insert the evidence given by the said E. F., to prove the alibi*); whereas, in truth and in fact, the said E. F. did not (*here negative the testimony given by the said E. F.*); and whereas, in truth and in fact, at the time when the said C. D. did so solicit, incite, and endeavor to persuade the said E. F. to give such evidence upon his oath as aforesaid, he the said C. D. well knew that the said E. F. would not give his evidence according to the truth, (*t'*) and that the same evidence so to be given was false, feigned, and altogether fictitious; to the evil example, etc., against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*t'*) This is necessary. U. S. v. Wilcox, 4 Blatch. C. C. 391.

(599) *Subornation of perjury, in an action of trespass.*(u)

That heretofore, to wit, at, etc., a certain issue was joined in the court of our lady the queen, before the queen herself (the said court then and still being holden at Westminster, in the county of Middlesex), between one J. L. and one J. W. in a certain plea of trespass and assault, in which the said J. L. was plaintiff, and the said J. W. defendant. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and before the trial of the said issue as hereinafter mentioned, and whilst the same was depending, to wit, on, etc., J. S., late, etc., not having the fear of God before his eyes, but, etc., and wickedly contriving and intending to pervert the due course of law and justice, and wickedly and maliciously contriving and intending unjustly to aggrieve the said J. L., the plaintiff in the said issue, and to deprive him of the benefit of his suit then in question, and to subject him to the payment of sundry heavy costs, charges, and expenses, then and there, to wit, on, etc., at, etc., unlawfully, corruptly, wickedly, and maliciously did solicit, suborn, instigate, and endeavor to persuade one J. N. to be and appear as a witness at the trial of the said issue, for and on behalf of the said J. W., the defendant in the said issue, and upon the said trial falsely to swear and give evidence to and before the jurors which should be sworn to try the issue aforesaid, certain matters, material and relevant to the said issue, and to the matters therein and thereby put in issue, in substance and to the effect following, that is to say, that he the said J. W. (meaning the defendant in the issue aforesaid) did, on a certain day then past, to wit, on the tenth day of April, in the year aforesaid, beat, wound, and bruise the said J. L. (meaning the plaintiff in the issue aforesaid), and did knock him the said J. L. down, and with a large stick did then and there beat, wound, and bruise, and greatly disfigure the said J. L. whilst he was so down.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the sittings at *nisi prius*, holden after Trinity term aforesaid at Westminster, in the county aforesaid, before the right honorable T. L. D., her maj-

(u) Arch. C. P. 5th Am. ed. 681.

esty's chief justice assigned to hold pleas in the court of our said lady the queen, before the queen herself, to wit, on the day and year aforesaid, at Westminster aforesaid, in the county aforesaid, the issue aforesaid came on to be tried, and was then and there tried by a jury of the country in that behalf duly sworn and taken between the parties aforesaid, upon which said trial the said J. N., in consequence and by means, encouragement, and effect of the said wicked and corrupt subornation and procurement of the said J. S., did then and there appear as a witness for and on behalf of the said J. W., the defendant in the plea above mentioned, and was then and there duly sworn and took his corporal oath upon the holy gospel of God, before the said T. L. D., her majesty's chief justice as aforesaid, that the evidence which he, the said J. N., should give to the court there, and to the jury so sworn as aforesaid, touching the matter then in question between the said parties, should be the truth, the whole truth, and nothing but the truth (he, the said T. L. D., chief justice as aforesaid, then and there having sufficient and competent authority to administer the said oath to the said J. N. in that behalf), and that at and upon the trial of the said issue so joined between the said parties as aforesaid, it then and there became and was a material question whether the said J. W. assaulted and beat the said J. L.; and the said J. N., being so sworn as aforesaid, then and there at the trial of the said issue, upon his oath aforesaid, falsely, corruptly, and wilfully, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said T. L. D., chief justice as aforesaid, did depose and swear (amongst other things), in substance and to the effect following, that is to say, that (*here set out J. N.'s evidence, in substance the same as above stated where the subornation is charged*); whereas, in truth and in fact, the said J. W. did not, etc. (*so proceeding to assign the perjury as in the precedents ante*); and whereas, in truth and in fact, the said J. S., at the time he solicited, suborned, instigated, and endeavored to persuade the said J. N. falsely and corruptly to swear as aforesaid, well knowing that, etc. (*pursuing the words in the assignment of perjury*). And so the jurors aforesaid, upon their oath aforesaid, do say, that the said J. S., on the said third day of July, in the fourth year of the reign aforesaid, at the parish aforesaid, in the

county aforesaid, did unlawfully, corruptly, wickedly, and maliciously suborn and procure the said J. N. to commit wilful and corrupt perjury in and by his oath aforesaid, before the said jurors so sworn and taken between the said parties as aforesaid, and before the said T. L. D., chief justice as aforesaid (the said T. L. D. then and there having sufficient and competent power and authority to administer the said oath to the said J. N.), to the great displeasure of Almighty God, the evil and pernicious example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(600) *Corruptly endeavoring to influence a witness in the U. S. courts.*(v)

That heretofore, to wit, on, etc., at, etc., a certain J. H. Y. was bound in recognizance with a certain J. P. V. in the sum of four thousand dollars, before A. D. K. T., an alderman and justice of the peace for the county of Philadelphia, conditioned that the said J. H. Y. should personally appear at the next circuit court of the United States of America, for the eastern district of Pennsylvania, to be holden at Philadelphia, in the eastern district aforesaid, on the eleventh day of October in the year aforesaid, and then and there to answer for one manslaughter committed by the said J. H. Y. upon one F. upon the high seas. And the grand inquest aforesaid do further present, that on the said fourth day of September in the year aforesaid, at the district aforesaid, and before the said A. D. K. T., alderman and justice of the peace as aforesaid, a certain T. P. was then and there bound in a recognizance in the sum of two hundred dollars, conditioned that he, the said T. P., should personally appear at the said circuit court of the United States for the district aforesaid, to be holden as aforesaid on the said eleventh day of October in the year aforesaid, and then and there give evidence on behalf of the United States of America against the said J. H. Y., for the said manslaughter by him the said J. H. Y. committed upon the said F. upon the high seas as aforesaid.

And the grand inquest aforesaid do further present, that afterwards, to wit, on, etc., at, etc., the said J. P. V., late of the

(v) This indictment was drawn in 1839, by the Hon. John M. Read, then district attorney in Philadelphia, but was never tried. See Wh. Cr. L. 8th ed. § 1332.

district aforesaid, yeoman, did then and there corruptly endeavor to influence the said T. P., then and there being a witness as aforesaid in the said circuit court of the United States of America for the eastern district aforesaid, in the discharge of his duties as a witness as aforesaid, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(601) *Endeavoring to entice a witness to withdraw himself from the prosecution of a felon.*(w)

That whereas, a certain S. S. and J. M'K., late, etc., on, etc., at, etc., were arrested and brought before W. C., Esq., then one of the justices of this commonwealth, the peace in the said county to keep assigned, the said S. S. and J. M'K. being charged upon the oath of G. F. with a certain felony and robbery by them committed; whereupon the same justice made his warrant in writing under his hand and seal in due form of law, directed to the keeper of the jail of the said county, commanding him to receive said S. and J. into the said jail, and them safely to keep until discharged by due course of law, by virtue of which said warrant the said S. and J. were committed to the jail of the said county, and into the custody of the keeper thereof; and the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that A. W. and M. R., both late of the county aforesaid, yeomen, not being ignorant of the premises, but well knowing the same, and contriving and intending the due course and execution of justice to obstruct and prevent, on the twentieth day of October, in the year aforesaid, and at the county aforesaid, unlawfully, corruptly, and wickedly did entice, solicit, and endeavor to persuade the said G. F. to abandon and withdraw himself from the further accusation and prosecution of the said S. S. and J. M'K., to the evil example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(w) Drawn by Mr. Bradford, then attorney-general of Pennsylvania, in 1780.

(602) *Persuading a witness not to give evidence against a person charged with an offence before a grand jury.(x)*

That heretofore, to wit, on, etc., A. B., of, etc. (*here state the authority of the government by which the attendance of the witness was compelled, whether a summons or a recognizance*). And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of taking said recognizance (*or the service of said summons as the case may be*), and from then until and upon the said day of therein mentioned, the evidence of the said A. B. was material and necessary to have been given in before the said grand jury, on the subject matter then to be heard and considered by them; which said grand jury were then and there duly and legally convened on that behalf, and were legally authorized and had competent authority to consider and decide upon the subject matter then and there by them to be heard; and that at the said term of said court (*here describe the court*), a bill of indictment was prepared against the said A. B. for the offence aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., of, etc., contriving and intending the due course of justice to obstruct and impede, on at unlawfully and unjustly dissuaded, hindered, and prevented the said A. B. from appearing before the justices of said court, and before the said grand jury, to give evidence before the said grand jury on the bill of indictment preferred as aforesaid against the said and that in consequence thereof the said A. B. did not appear and give evidence according to his duty in that respect, against, etc. (*Conclude as in book 1, chapter 3*.)

(603) *Inducing a witness to withhold his evidence as to the execution of a deed of trust, in Virginia.(y)*

That J. F., innkeeper, late, etc, on, etc., at, etc., did offer a contempt to the supreme court of law, held in and for Wythe

(x) Davis's Prec. 219. "This," says Mr. Davis, "is an offence at common law," for which see Hawk. b. 1, c. 21, s. 15. The mere attempt to stifle evidence, though it does not succeed, is criminal. 6 East, 464; 2 East, 5, 21, 22; 2 Str. 904; 2 Leach, 925. Wh. Cr. L. 8th ed. § 1333.

(y) Com. v. Feeley, 2 Va. Cases, 1. On the issue joined on this information, the jury found the defendant guilty, and assessed his fine at twenty dollars.

The defendant moved the court to arrest the judgment, for the following reasons: 1. Because the offence is not specified with sufficient certainty; 2. Because

county, in this, that he, the said J. F., did use means to prevent, and did then and there prevent, one S. W. from attending as a witness to give evidence to prove the execution of a deed of trust, which deed of trust was executed by the said J. F. to J. D., after he, the said S. W. had been duly summoned to attend said court as a witness to prove said deed of trust, on the fourth day of October term, one thousand eight hundred and twelve, by virtue of a summons issued by the clerk of said court, who was duly authorized to issue said summons, which act of the said J. F. is contrary to the laws and usages of this commonwealth, and against, etc. (*Conclude as in book 1, chapter 3.*)

(604) *Endeavoring to suborn a person to give evidence on the trial of an action of trespass, issued in the supreme judicial court of Massachusetts.*(z)

That at the supreme judicial court, begun and holden at B., within and for the county of S., on the Tuesday of in the year of our Lord one thousand eight hundred and two, before I. P., Esq., then the chief justice of the said court, a certain issue duly joined in the said court between one C. D. and one E. F., in a certain plea of trespass, wherein it was alleged, in substance, that the said E. F. had, with force and arms, assaulted, beat, bruised, wounded, and ill-treated the said C. D., in which the said C. D. was plaintiff, and the said E. F. was defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country in that behalf duly summoned, taken, empanelled, and sworn between the parties aforesaid; and that before the trial of the said issue, and during the time the same was pending, to wit, on the day of at B. aforesaid, in the county aforesaid, G. H., of in the county aforesaid, grocer, wickedly contriving and intend-

there is no criminal offence stated, the subpoena stated in the information not being legal process. The questions arising on this motion were adjourned to the general court.

The decision of this court was as follows: "*Ordered*, That it be certified, etc., that the offence is stated in the information with sufficient certainty; that it is a criminal offence, for which an information will lie; and that there exists on the face of the record no cause for arresting the judgment."

(z) This precedent, says Mr. Davis, is drawn on the statute of Massachusetts of 1812, ch. 143, but it concludes also at common law. Prec. 268. See also 2 Chit. 482, which cites the above precedent from Cro. C. C. 587, 6th ed.

ing, as much as in him lay, to prevent justice and pervert the due course of law, and intending unjustly to aggrieve the said E. F., the defendant above named, and wickedly to cause and procure the said E. F. to be found guilty of the premises alleged against him in the said issue, and thereby to subject him to the payment of large sums of money for the payment of damages and costs to be recovered against him in the suit aforesaid, then and there, on the same day and year last aforesaid, at B. aforesaid, in the said county of S., did unlawfully and wickedly solicit, instigate, and, as much as in him lay, wilfully and corruptly endeavor to persuade and procure one I. J. to be and appear as a witness on the part and behalf of the said C. D., the plaintiff, aforesaid, at the trial of said issue so as aforesaid joined, and, upon the same trial, to commit wilful and corrupt perjury, by falsely swearing and giving in evidence to and before the jurors of the jury aforesaid, so sworn between the parties aforesaid to try the said issue, in substance and to the effect following, that is to say (*here insert the evidence which the party was instigated to give with proper innuendoes if necessary*); whereas, in truth and in fact (*here assign the perjury intended to be committed by negativing the false evidence intended to be given*), in manifest subversion of justice, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(605) *Soliciting a woman to commit perjury, by swearing a child to an innocent person, the attempt being unsuccessful.*(a)

That A. B., late of, etc., being a wicked and evil disposed person, and minding and intending great injury to one C. D., of, etc., a good and valuable subject of our said lady the queen, and unjustly to cause and procure him to be put to great charges and expenses of his moneys, and to give security for the maintenance of a child, of which one E. F., spinster, was, on, etc., pregnant, and which by the laws of this realm was likely to become a bastard, did on the same, etc., aforesaid, at, etc., aforesaid, unlawfully and wickedly solicit, instigate, persuade, and secure

(a) To solicit or attempt to persuade a witness to swear falsely, though such solicitation be ineffectual, is a misdemeanor at common law. *R. v. Edwards*, cited in *Schofield's case*; *Cald.* 400; *Wh. Cr. L.* 8th ed. § 1333. For a successful attempt to commit the same offence, see 597.

the said E. F. to go before one of the justices of our said lady the queen, assigned, etc., and that she the said E. F., in consequence of such solicitation, instigation, persuasion, and procurement, did go in her own proper person before G. H., one of the justices of our said lady the queen, assigned, etc., and then and there did, etc. (*state the filiation*); whereas, in truth and in fact, he the said A. B., at the time when he so endeavored to persuade, solicit, and instigate the said E. F. to make oath and swear as aforesaid, then and there well knew that the said C. D. would be put to great charges and expenses of his moneys, if she the said E. F. would swear as aforesaid; and whereas, in fact and in truth, he the said A. B., at the said time when he so endeavored to persuade, solicit, and instigate the said E. F. to make oath and swear as aforesaid, had no reasonable or probable cause whatsoever to suspect or imagine that the said C. D. was the father of such child, of which she the said E. F. was so pregnant as aforesaid; and whereas, in truth and in fact, she the said E. F. never told or informed him, the said A. B., that the said C. D. was father of such child; and whereas, in truth and in fact, he the said A. B. so wickedly and unlawfully endeavored to persuade, solicit, and instigate the said E. F. to swear as aforesaid, in order that he the said A. B. might be exonerated, freed, and discharged from divers expenses which might accrue to him as being the father of such child, after the same should be born of the body of her the said E. F., against, etc. (*Conclude as in book 1, chapter 3.*)

(606) *Soliciting a witness to disobey a subpoena to give evidence before the grand jury.*(b)

That on, etc., a certain writ of our said lady the queen, called a *subpoena ad testificandum*, had been and was duly issued and tested by and in the name of P. Q., of, etc., at, etc., the same day and year aforesaid, the said P. Q. then and there being *custos rotulorum* in and for the said county, which said writ was directed to B. B. and D. D., by which said writ our said lady the

(b) This is an offence indictable at common law. Hawk. b. 1, c. 21. The mere attempt to stifle evidence is criminal, though the persuasion should not succeed, on the general principle that an incitement to commit any crime is itself criminal. *R. v. Phillips*, 6 East, R. 464; *State v. Carpenter*, 20 Vt. 9; Wh. Cr. L. 8th ed. § 1333.

queen commanded, etc. (*recite the writ*). And the jurors, etc., that a copy of the said writ was, on, etc., at, etc., duly served on the said H. H., who then and there had notice to appear and give evidence according to the exigency of such writ, and that the evidence of the said H. H., at the time of issuing the said writ, and from thence until and upon the said, etc., therein mentioned, was material and necessary to have been given before the said grand jury on the said bill of indictment, so to be preferred against the said A. B. as aforesaid, and that at the sessions of the peace holden at, etc., in and for the said county, on, etc., aforesaid, such bill of indictment was preferred against the said A. B., to and before a certain grand jury then and there duly assembled in that behalf. And the jurors, etc., that A. B., late of, etc., being an evil disposed person, and contriving and intending to obstruct and impede the due course of justice, on, etc., at, etc., unlawfully and unjustly solicited, persuaded, and prevailed upon the said H. H. to absent himself from the said sessions of the peace, holden as aforesaid, and not to appear there before the justices then and there assembled, to testify the truth and give evidence before the said grand jury on the said bill of indictment so preferred against the said A. B. as aforesaid (and the said H. H., in consequence of such solicitation and persuasion, did not so appear and give evidence according to the exigency of said writ), to the great obstruction, hindrance, and delay of public justice, in contempt, etc., to the evil, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the said, etc., a certain other writ of our said lady the queen had duly issued, directed to the said B. B. and D. D., by which said last mentioned writ, our said lady the queen commanded the said B. B. and D. D. that, etc. (*recite the writ*). And the jurors, etc., that the evidence of the said H. H., at the time of issuing the said last mentioned writ, and from thence until and upon the said, etc., therein mentioned, was material and necessary to have been given before the said grand jury in the said bill of indictment so to be preferred against the said A. B. as aforesaid. And the jurors, etc., that the said A. B., being

an evil disposed person, etc. (*same as first count, saying, "endeavored to dissuade," etc., and omitting the allegations that the solicitation was successful*).

(606a) *Administering unlawful oath, under English statute.*

That J. S., etc., on, etc., at, etc., did feloniously and unlawfully administer and cause to be administered to one J. N. a certain oath and engagement, purporting and intended to bind the said J. N. not to inform or give evidence against any associate, confederate, or other person of or belonging to a certain unlawful association and confederacy; and which said oath and engagement was then taken by the said J. N., against, etc.

(606b) *Taking such oath.*

Did feloniously and unlawfully take a certain oath and engagement purporting (as in last form), he the said J. N. not being then compelled to take the said oath and engagement, against, etc.(c)

(c) These forms are taken from Arch. C. P. 19th ed. pp. 842-3.

CHAPTER II.

CONSPIRACY.(a)

- (607) General form. Unexecuted conspiracy.
- (608) Conspiracy with overt act.
- (609) Conspiracy to rob.
- (610) Conspiracy to murder, with an attempt to induce a third party to take part in the same.
- (610a) Conspiracy to kill a female child.

(a) Before proceeding to examine the requisites of an indictment for conspiracy, there are one or two features of the offence generally which it is worth while to consider. "The offence of conspiracy," says Mr. Serjeant Talfourd, "is more difficult to be ascertained precisely than any other for which an indictment lies; and is indeed rather to be considered as governed by positive decisions than by any consistent and intelligible principles of law. It consists, according to all the authorities, not in the accomplishment of any unlawful or injurious purpose, nor in any one act moving towards that purpose; but in the actual concert and agreement of two or more persons to effect something, which *being so concerted or agreed*, the law regards as the object of an indictable conspiracy." When parties have once agreed to cheat a particular person of his money, though they may not then have fixed on any means for that purpose, the offence of conspiracy is complete. Per Bayley, J., *R. v. Gill et al.*, 2 B. & Al. 205. See, however, Wh. Cr. L. 8th ed. §§ 1337 *et seq.* As to *R. v. Gill*, see *R. v. King*, 13 L. J. (M. C.) 119 (E. 1844); *R. v. Blake*, 6 Q. B. 126; Wh. Cr. L. 8th ed. §§ 1359, 1401, and observations, *infra*, notes to 607. *R. v. Gill* is fully discussed in Wh. Cr. L. 8th ed. § 1348. There are two classes of cases in which the criminality of such agreement is intelligible and obvious: first, where the object proposed would, if accomplished, be a criminal offence in all parties acting in it; and second, where, though the ultimate object may be lawful, the means by which the parties conspirators propose to effect their purpose involve in them an indictable offence. "An indictment for conspiracy ought to show, either that it was for an unlawful purpose, or to effect a lawful purpose by an unlawful means" (per Ld. Denman, *R. v. Seward*, 1 A. & E. 711; 3 N. & M. 557); but he is reported to have since said, that "this antithesis is not very correct" (*R. v. Peck*, 9 A. & E. 690; 1 Per. & Dav. 508); and, as is elsewhere shown (Wh. Cr. L. 8th ed. § 1337), there are cases ruling that, when there is a combination to effect a civil tort (not in itself indictable) by sinister means (though not in themselves indictable), the combination may become an indictable conspiracy. See *R. v. Spragge*, 2 Burr. 999, cited by Ld. Denman, 3 N. & M. 562; 1 A. & E. 714. "Of the first kind are conspiring to commit a felony, or conspiring to obtain money under false pretences, etc.; where the object, if carried into effect, would be a substantive offence, and where, therefore, *concert* is indictable as an *act* in itself tending to produce it. Of the second kind is a conspiracy to support a cause, in itself just, by false testimony; and the same principle would apply here; for, whether the concerted offence be the end or the means, it is equally an offence which, if consummated, would subject the offenders to the visitation of criminal justice. But it is not easy to understand on what principle conspiracies have been holden indictable, where neither the

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- (611) Conspiracy to cheat prosecutor by divers false pretences and subtle means.
- (611a) Conspiracy to cheat by fraudulent devices and false pretences.
- (612) Conspiracy to defraud by means of false pretences and false writings in the form and similitude of bank notes; the overt act being the uttering a note purporting to be a promissory note, etc., and to have been signed, etc.

end nor the means are in themselves regarded by the law as criminal, however reprehensible in point of morals. *Mere concert is not in itself a crime*, for associations to prosecute felons, and even to put laws in force against political offenders, have been holden legal. *R. v. Murray* and others, tried before Abbott, C. J., at Guildhall, 1823. If, then, there be no indictable offence in the object, no indictable offence in the means, and no indictable offence in the concert, in what part of the conduct of the conspirators is the offence to be found? Can several circumstances, each perfectly lawful, make up an unlawful act? And yet such is the general language held on this subject, that at one time the immorality of the object is relied on; at another, the evidence of the means; while at all times, the concert is stated to be the essence of the charge; and yet that concert, independent of an illegal object or illegal means, is admitted to be blameless." Talfourd, *ut sup.* And, as is elsewhere shown (*Wh. Cr. L.* 8th ed. § 1338), if we scrutinize the cases in which it has been held indictable to effect a non-indictable end by non-indictable means, it will be found that the means employed involved either false personation, cheats, or breaches of the peace.

"The utmost limit of the modern doctrine of conspiracy seems to be reached in the decisions respecting concerted disapprobation of a performer or a piece at the theatre. The case of *Macklin* is well known, on whose prosecution several persons were committed for hissing him on his appearance in one of Garrick's favorite characters; and in accordance with this precedent, *Sir James Mansfield* is said to have expressed himself in the case of *Clifford v. Brandon*, 2 Campb. 369, in the following terms:—

"The audience have certainly a right to express by applause or hisses the sensations of the moment; and nobody has ever hindered or would ever question the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor or damning a piece, there can be no doubt such a deliberate and preconcerted scheme would amount to a conspiracy, and that the persons concerned in it might be brought to punishment." In this case the act is lawful; the means are lawful; the motive may be even laudable, as if a notoriously immoral piece were announced, and the parties determined to oppose it; and yet the concert alone makes the crime. It is extremely difficult to understand this, unless concert be a crime; and still more difficult to reconcile it, or many other of the cases, to the decision of the king's bench in 1811; *R. v. Turner* and others, 13 East, 228, cited by Taunton, J., in *R. v. Seward et al.*, 1 A. & E. 711 (see comments *Wh. Cr. L.* 8th ed. § 1353), to show that it is not the combining to do *any* wrongful act which constitutes a conspiracy; where it was holden that an indictment would not lie for a conspiracy to enter a preserve of hares, the property of another, for the purpose of ensnaring them in the night-time, and with offensive weapons, Lord Ellenborough observing, 'I should be sorry to have it doubted, whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offence which would subject them to infamous punishment.' Here the object was as much *illegal* as any object can be which is not in itself indictable, and the act concerted, that of going armed at night to destroy game, so dangerous to the public, that it has since been made punishable with transportation; and yet this, according to the doctrine laid down, was not the subject of an indict-

OFFENCES AGAINST SOCIETY.

- (613) Conspiracy to cheat prosecutor by inducing him to buy a bad note.
- (614) To cheat by indirect means, etc., with overt acts charging false pretences, etc.
- (615) Conspiracy to cheat by false pretences. Conspiracy "by divers false pretences and subtle means and contrivances" to obtain goods, etc., from prosecutors. Overt acts charging a fraudulent carrying on business by a fictitious name, receiving goods on that basis, and fraudulently concealing the same.
- (616) Conspiracy to obtain from prosecutor certain articles under the pretence that defendants were the servants of a third party. Overt acts charging the consummation of the conspiracy.
- (617) Conspiracy to get prosecutor's goods by false pretences, etc.
- (618) Against the officers of a bank, for a conspiracy to obtain by fraudulent means, discounts on state stock to a large amount.

able conspiracy, because it was only a civil trespass. On the principle of this decision, it is difficult to understand how many of the cases of conspiracy can be sustained, as that of conspiracy to seduce a young lady; for the object in itself, however immoral, would be only the subject of an action on the case at the suit of the father. *R. v. Ld. Grey and others*, 3 St. Tr. 519; 1 East, P. C. 460. And yet this has been holden indictable, although no artifice was employed, and the lady was a willing participant in the elopement planned by the defendants. *Ibid.* See also *R. v. Delaval and others*, 3 Burr. R. 1434." But these cases may be explained consistently with the recognition of the rule that either the means or the end must be indictable. In *Macklin's* case the means contemplated a breach of the peace; and so of *Eberle's* case, 3 S. & R. 9; Wh. Cr. L. 8th ed. § 1353. In *Grey's* case, and the analogous cases cited in Wh. Cr. L. 8th ed. §§ 1361 *et seq.*, the means involved false impersonation.

"The great difficulty," say the commissioners for revising the statutes of New York, "in enlarging the definition of this offence, consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud by compelling a discovery under oath. It is a sound principle of our institutions, that no man shall be compelled to accuse himself of any crime, which ought not to be violated in any case. Yet such must be the result, or the ordinary jurisdiction of courts of equity must be destroyed, by declaring any private fraud, when committed by two, or any concert to commit it, criminal." This view, it is true, is contested by *Stebbins*, senator, in *Lambert v. The People*, 9 Cow. 609. "But the court is not thereby ousted of its jurisdiction. Because a defendant is not bound to answer certain facts, the plaintiff is not precluded from proving those facts by witnesses, nor is the court precluded from administering the proper relief when the facts are shown. The settled law of that court has always been, that a demurrer to the discovery sought, is no bar to that part of the bill which prays relief. 3 Johns. Ch. R. 471; 5 Ib. 186. The amount of the objection then is this: if conspiracies to commit private frauds are criminal, a defendant in equity is not bound to confess such crime. The plaintiff must prove his case by other means than the defendant's confession, and then the court stands ready to relieve him. Surely there is no great hardship in this. It is simply putting the plaintiff upon proof of his cause in that court, in the same manner as he is bound to prove it in any other court." That the present policy is to limit prosecutions for conspiracy to cases where the object is to effect an indictable offence, see Wh. Cr. L. 8th ed. § 1337 *et seq.*

CONSPIRACY.

- (619) Against same for conspiring to obtain by fraudulent means the temporary use of a large quantity of notes belonging to said bank, without paying interest for them.
- (620) Against same for conspiring to appropriate several bills of exchange, etc.
- (621) Against same for obtaining money from the bank by means of false entries and a fictitious draft.
- (621a) Conspiracy of directors of company by false pretences to obtain recognition by stock exchange.
- (622) Conspiracy by the maker of two promissory notes, and two other persons, fraudulently to obtain the said notes from the holder.
- (623) Conspiracy and cheat, under pretence of being a merchant, with overt act.
- (624) Conspiracy to sell lottery tickets.
- (625) Conspiracy for enticing a person to play at unlawful games, etc.
- (626) Conspiracy to make a great riot, and to demolish walls, buildings, and fences, with overt acts.
- (627) Second count, without overt acts.
- (628) Conspiracy to prevent, by force and arms, the use of the English language in a German congregation, and to oppose "with their bodies and lives," and by all means lawful and unlawful, the introduction of any other language but the German. Overt acts, riot and assault.
- (629) Conspiracy to produce abortion on a woman not quick.
- (630) Second count, with overt act.
- (631) Conspiracy by persons confined in prison, to effect their own escape, and that of others.
- (632) By prisoners to escape; with overt act; attempting to blow up the wall of a prison with gunpowder.
- (633) By prisoners to effect their escape, with overt act; breaking down part of the wall of the prison.
- (634) Conspiracy to impose on the public, by the manufacture of spurious indigo, with intent to sell the same as genuine indigo of the best quality.
- (635) Conspiracy to publish fraudulent bank notes, with intent to cheat the public.
- (635a) Conspiracy to get up false recommendations of character.
- (635b) Conspiracy of city officials to defraud city by false appraisement.
- (636) Conspiracy to defraud intending emigrants of their passage money by pretending to have an interest in certain ships.
- (637) Conspiracy, by false representation, to induce a party to forego a claim.
- (638) Conspiracy to defraud the queen, by fraudulently removing goods subject to duties.
- (639) Conspiracy to cast away a vessel, with intent to defraud the underwriters, at common law. First count, conspiracy to cast away, etc.

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- (640) Second count. Conspiracy to defraud the underwriters, and as overt acts in pursuance thereof, loading a vessel with a sham cargo, exhibiting her to the underwriters, and fraudulently representing to them that the vessel contained specie, etc.
- (641) Third count. Conspiracy to defraud the underwriters by falsely representing to them that a vessel loaded with a sham cargo was loaded with specie, and was the property of defendants.
- (642) Fourth count. Conspiracy to procure the insurance, in a particular company, of certain boxes of hay as boxes of dry goods, and then afterwards to cause the vessel to be burned; and in pursuance of the conspiracy, as an overt act, inducing an agent of the underwriters to negotiate for them an insurance.
- (643) Conspiracy to defraud a railway company by travelling without a ticket on some portion of the line, obtaining a ticket at an intermediate station, and then delivering it up at the terminus, as if no greater distance had been travelled over by the passenger than from such intermediate station to the terminus.
- (643a) Conspiracy to defraud railroad company by fraudulently filling and uttering blank passes.
- (644) Against A., B., C., and D., for a conspiracy to rise upon a vessel, and carry her to a port occupied by an enemy; with an overt act, and against E. for comforting and abetting them, etc.
- (645) Conspiracy to disturb a party in the possession of his lands, and to deprive him of them.
- Second count. Similar, without overt acts.
- Third count. To cut down timber trees.
- Fourth count. Exactly the same, without overt acts.
- (646) Fifth count. To cheat tenants of rent, by false claim as landlord.
- Sixth count. Exactly similar, but without overt acts.
- (647) Seventh count. To molest tenants by distresses, etc.
- Eighth count. Exactly similar, without overt acts.
- (648) Conspiracy to obtain goods upon credit, and then to abscond and defraud the vendor thereof.
- (649) Conspiracy to defraud an illiterate person, by falsely reading to him a deed of bargain and sale, as and for a bond of indemnity.
- (650) Conspiracy to induce a person of unsound mind to sign a paper authorizing the defendants to take possession of his goods.
- (650a) Conspiracy to abduct a child.
- (651) Conspiracy to procure the elopement of a minor daughter from her father.
- First count, charging the conspiracy with an overt act, averring that, in furtherance of the conspiracy, the defendants aided the said minor to elope.

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- (652) Second count. Conspiracy to procure the elopement of the said minor, with intent to marry her to one C. K. ; and overt act, charging the defendant, etc.
- (653) Conspiracy to inveigle a daughter from the custody of her parents, for the purpose of marrying her (in substance).
- (653*a*) Conspiracy to bring about a sham marriage.
- (653*b*) Conspiracy to concoct a fraudulent marriage.
- (654) Conspiracy to procure the defilement of a female.
- (655) Conspiracy to incite J. N. to lay wagers, etc. ; overt act actually cheating.
- (656) Conspiracy at common law, among workmen, to raise their wages and lessen the time of labor.
- (657) Conspiracy by workmen, etc., in the employ of A. and B., to prevent their masters from retaining any person as an apprentice.
- (657*a*) Conspiracy to compel the reinstatement of a discharged workman.
- (657*b*) Conspiracy to obstruct workmen.
- (658) Conspiracy by parties engaged on the public works, to increase the rate of passage money and freight.
- (659) Conspiracy to charge a man with a crime.
- (660) Conspiracy to charge a man with receiving stolen goods knowing them to be stolen, and obtaining money for compounding the same.
- (661) Conspiracy to charge a man with receiving stolen goods, and thereby obtaining money for compounding the same, and causing him to lay out a sum of money for the entertainment of the conspirators at one of their houses.
- (662) Conspiracy to charge a man with an unnatural crime, and thereby to obtain money.
- (663) Conspiracy to extort money generally by criminal prosecution. First count, charging a conspiracy to extort, by commencing and continuing a prosecution.
- (664) Second count, charging a prosecution already commenced, and a conspiracy to extort money by proposing to suppress it.
- (665) Third count, charging a conspiracy to extort, by promising to compromise a then pending prosecution.
- (666) Conspiracy to impoverish the prosecutor, and hindering him from exercising his lawful trade as a tailor, with an overt act, setting forth the consummation of the conspiracy.
- (667) Conspiracy to defame a public officer. First count, conspiracy to defame by charging corrupt conduct.
- (668) Second count. Same, setting out the matter charged.
- (669) Third count. By charging the prosecutor with having been guilty of corruption in a particular case.
- (670) Conspiracy to defeat public justice by giving false evidence, and suppressing facts, on a charge of felony.

- (671) Conspiracy to indict a person for a capital offence, who was acquitted on the trial.
- (672) Conspiracy to induce a material witness to suppress his testimony.
- (673) Same as last, in another shape.

(607) *First count. Unexecuted conspiracy.*

That A. B., late of, etc., yeoman, and C. D., late of, etc., yeoman,^(b) being persons of evil minds and dispositions, together with divers other evil disposed persons, whose names are to this inquest as yet unknown [*see note (b)*], wickedly devising and intending to (*setting out the intent*),^(c) on, etc., at the county aforesaid,^(d) and within the jurisdiction of the said court, fraudulently, maliciously, and unlawfully did conspire, combine, confederate, and agree together,^(e) between and amongst themselves, by^(f) (*setting forth the means*), unlawfully to^(g) (*setting forth the party to be injured, or the object to be obtained*), against, etc. (*Conclude as in book 1, chapter 3.*)

(b) A conspiracy must be by two persons at least; one cannot be convicted of it, unless he has been indicted for conspiring with persons to the jurors unknown. 1 Hawk. c. 72; Turpin v. State, 4 Blackf. 72; People v. Howell, 4 Johns. 296; State v. Allison, 3 Yerg. 428; R. v. Kinnersley, 1 Stra. 193; 1 Ld. Raym. 484; R. v. Ludbury, 12 Mod. 262; 13 East, 412; 2 Salk. 593; Wh. Cr. L. 8th ed. § 1388 *et seq.* So in an indictment for conspiracy against two, the acquittal of one is the acquittal of the other. State v. Tom, 2 Dev. 569; Wh. Cr. L. 8th ed. §§ 1391, 1407. But where three persons were engaged in a conspiracy, and one was acquitted and the other died before trial, it was held that the third could nevertheless be tried and convicted. R. v. Nichols, 2 Str. 1227; R. v. Kennedy, 1 Str. 193; People v. Olcott, 2 Johns. Ca. 301. A man and his wife, being in law but one person, cannot be convicted of the same conspiracy, unless other parties are charged; Wh. Cr. L. 8th ed. § 1392; but where the defendant is charged with conspiracy with persons unknown, it is good, notwithstanding the names of the persons unknown may have transpired to the grand jury. People v. Mather, 4 Wend. 231; Wh. Cr. L. 8th ed. § 1392. The jury may find all or some of the defendants guilty of conspiring to effect one or more of the objects specified upon a count charging one conspiracy, and one only, against all the defendants therein named, to effect several illegal objects. O'Connell v. R., 11 Cl. & Fin. 155; 9 Jur. 25. In other words, the allegations of objects in each count are divisible. But the verdict must find two or more guilty of a specific conspiracy, or the prosecution fails. Wh. Cr. L. 8th ed. § 1407.

It is not necessary that the same co-conspirators should be continued through all the counts. If the proof should make the change prudent, the names may be varied.

That co-conspirators may be alleged to be unknown, see Wh. Cr. L. 8th ed. § 1392. All contributing to the common design may be joined. Wh. Cr. L. 8th ed. § 1390.

(c) The subject of scienter and intent has been already generally noticed. (*Supra*, notes to form 2, vol. i. p. 26.)

It is not necessary specially to designate the persons whom the defendants, in a conspiracy to cheat, intended to defraud. It will be enough to say that they

intended to defraud all persons with whom they should deal; or all persons in a particular trade. It is clearly enough to charge them with intending to defraud a particular person, though such person may be only one of several (*e. g.*, one of a firm) whom they intended to defraud. But when the allegation is made, it must be proved. It may, therefore, at common law, be fatal to charge an intent to defraud a non-existing person, or a wrong person. Wh. Cr. L. 8th ed. § 1226.

(*d*) The venue may be laid in the county in which the act was done by any of the conspirators, in furtherance of their common design. *R. v. Brisac*, 4 East, 164; Wh. Cr. L. 8th ed. § 1397.

(*e*) This is better than "conspired together." See *R. v. Stewart*, 3 N. & M. 557; 1 A. & E. 706.

(*f*) Conspiracies in reference to this part of the indictment may be classed under the following heads:—

I. Conspiracies to commit an indictable offence. Wh. Cr. L. 8th ed. § 1342.

1st. Conspiracies to commit felonies. *Ib.* §§ 1343 *et seq.*

2d. Conspiracies to commit misdemeanors, under which division will be treated:—

(1) Conspiracies to violate the false pretence laws. *Ib.* § 1348.

(2) Conspiracies to violate the laws making it penal in a debtor to secrete his property with intent to defraud his creditors. *Ib.* § 1351.

(3) Conspiracies to violate the lottery laws. *Ib.* § 1352.

(4) Conspiracies to commit breaches of the peace. *Ib.* § 1353.

(5) Conspiracies to assault. *Ib.* § 1354.

(6) Conspiracies to utter forged notes. *Ib.* § 1357.

(7) Seditious conspiracies. *Ib.* § 1356.

II. Conspiracies to make use of means themselves the subject of indictment, to effect an indifferent object. *Ib.* § 1358.

III. Conspiracies to do an act the commission of which by an individual is not indictable, but the commission of which by two or more in pursuance of a previous combination, is calculated to effect either of the following objects:—

1st. To defraud an individual by fraudulent and indirect devices. *Ib.* § 1360.

2d. To commit an immoral act, such, for instance, as the seduction of a young woman. *Ib.* § 1361.

3d. To prejudice the public generally, as, for instance, by unduly elevating or depressing the price of wages, of toll, or of any merchantable commodity, or endeavoring to defraud the revenue. *Ib.* § 1366.

4th. To falsely accuse another of crime, or use other improper means to injure his reputation, or to extort money from him. *Ib.* § 1376.

5th. To impoverish another in his trade or profession. *Ib.* §§ 1368 *et seq.*

6th. To prevent the due course of justice. *Ib.* § 1380.

I. *Conspiracies to commit an indictable offence.*

1st. *Conspiracies to commit felonies.*

Where an indictment charges a conspiracy to commit a felony, using the same words to set forth the object of the conspiracy as would have been used to charge the commission of the offence itself, no possible exception as to form can be taken. Wh. Cr. L. 8th ed. § 1381. But this is often impracticable, and if it were not, it would be absurd to charge A. and B. with conspiring "with one knife, of the value of one shilling, which he the said A. in his right hand was then and there to have and hold, him the said C. feloniously, etc., to strike," or with conspiring to rob the prosecutor of half a dozen distinct articles which he happened to have in his pocket, but of the value and character of which it would be irrational to suppose the defendant to have been beforehand acquainted. It is enough, therefore, for the pleader to set out the offence aimed at by such apt words as

will describe it as a conclusion of law. Thus it is sufficient to say, that the defendants conspired "feloniously, wilfully, and of their malice aforethought, to kill and murder," etc., without describing the weapon to have been used (*State v. Dent*, 3 Gill & Johns. 8); or that they conspired "certain goods and chattels of great value, etc., then belonging to and on the person of the said A. B., feloniously to steal," without going on to mention what those goods and chattels were. *Com. v. Rogers*, 5 S. & R. 463. See *R. v. Higgins*, 2 East, 5. This liberality, in fact, is extended to every case where an attempt is made to commit an offence itself indictable, whether by one or by a confederacy. Arch. C. P. 5th Am. ed. 262, 485, 487, 488; *People v. Bush*, 4 Hill, N. Y. R. 133; Wh. Cr. L. 8th ed. § 1343.

That in Iowa it is enough to aver simply a conspiracy to steal appears by the following opinion of Beck, C. J., in *State v. Sterling*, 34 Iowa, 443: "The defendants demurred to the indictment on the ground that it charges more than one offence. It alleges that the defendants did unlawfully and feloniously conspire, etc., to rob and steal from one T. B. R. and divers other guests, boarders, and lodgers of the Patterson house, etc. The point made by the demurrer is that the indictment alleges a conspiracy to rob, and also a conspiracy to steal, thus charging more than one offence. The demurrer was overruled, and upon this ruling is based the first point presented in the brief of defendants' counsel. The decision of the district court upon the demurrer was correct."

Whether a conspiracy to commit a felony merges in the consummated felony is elsewhere discussed. Wh. Cr. L. 8th ed. § 1344. So far as concerns the pleading, it is sufficient here to say that if the felony has been consummated, it is proper to indict for the felony; though a count for conspiracy may be sustained in cases where the proof of the overt act falls short.

It should be observed, however, that in those states in which it is held that a conspiracy to commit a felony merges in the felony when committed, an indictment charging the commission of a felony in pursuance of a conspiracy will not at common law sustain a conviction for conspiracy.

The policy of our courts, in a kindred line of offences, has permitted a joinder of counts which, though originally discountenanced in England, can work no injustice to the prisoner, and may save great expense and loss of time. Thus, counts for robbery and for attempts to rob; for rape and attempts to ravish; for burglary and attempts to commit burglary, as has been seen, are frequently joined. *Harman v. Com.*, 12 S. & R. 69; *Burk v. State*, 2 Har. & J. 426; *State v. Coleman*, 5 Port. 52; *State v. Montague*, 2 M'C. 287; *State v. Gaffney*, Rice, 431; *State v. Boise*, 1 M'M. 190. See Wh. Cr. L. 8th ed. § 1387, etc. When the defendant is tried on the two charges together, he has the advantage of bringing to bear on the lighter offence the full number of challenges awarded to him on the heavier; nor can he be said to be embarrassed in the preparation of his defence, as the same evidence which would disprove the attempt would disprove the consummation. The only difference is, that instead of after an acquittal of the felony being subjected to another binding over and trial on the constituent misdemeanor, the two charges are tried at the same time, when the evidence on each side is fresh and at hand, and when neither can take advantage of a discovery of the antagonistic case. That this practice extends as properly to conspiracies to commit indictable offences, as to attempts or assaults with intent to commit the same, may be urged with great reason. By such a course the difficulty of merger will be avoided; for if the attempt was completed, the verdict attaches to the felony; if not, to the conspiracy. See fully Wh. Cr. Pl. & Pr. § 285.

2d. *Conspiracies to commit misdemeanors.*

As the law is that where the object is illegal it is not necessary to set out the means at large (*R. v. Eccles*, in note to *R. v. Turner*, 13 East, 230; 2 Russ. on Crimes, 687, 691; *Hazen v. Com.*, 23 Penn. St. 364; Wh. Cr. L. 8th ed. §§ 1345, 1348), it has been a common practice in preparing an indictment for a misdemeanor, the description of which is attended with any difficulties, to insert a count for conspiracy. Wh. Cr. Pl. & Pr. § 285. When the evidence of the

prosecution is finished, the court will compel it, in a proper case, to state on what class of counts it relies; and when this discretion is judiciously exercised, it is hard to see how the defendant can be embarrassed in management of his defence. Wh. Cr. L. 8th ed. §§ 1387 *et seq.* Where he is shown to have acted conjointly with others, he cannot justly complain if he is charged with having conspired with them in producing the particular result; and even when his co-conspirators are not brought to the notice of the grand jury, the courts have sustained counts for conspiracy, in which he is charged with conspiring with persons unknown. Wh. Cr. L. 8th ed. § 1393. The practical advantage of joining counts for conspiracy with counts for the constituent misdemeanor, is strongly illustrated by *Com. v. Gillespie*, 7 S. & R. 469. The defendants were charged in one set of counts with the sale of a lottery ticket, and in another with a conspiracy to sell it. The law being that in an indictment for the overt act the ticket should be particularly set out, as the ticket is usually of a complex character, it is convenient for the pleader to back up a count for the individual offence with a count for a conspiracy "to sell and expose to sale and cause to be sold and exposed to sale" (reciting the words of the statute) "a lottery ticket and tickets in a lottery, not authorized by the laws of this commonwealth." This was the language of the count which was sustained by the supreme court after a new trial in consequence of a variance in the count purporting to set forth the ticket, and an arrest of judgment for want of particularity in the counts charging the sale of the ticket without an attempt to set it out. After showing that such a generality of statement as appeared in the latter counts could not be tolerated, *Duncan, J.*, proceeded: "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly in the power of the prosecutor to lay with certainty. The conspiracy here was to sell prohibited lottery tickets, any he could sell, not of any prohibited lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence." The same liberality in the construction of counts for conspiracies to effect objects *per se* illegal, having prevailed in England (1 Russ. on Crimes, 691), the same practice of joining conspiracy counts with counts for the constituent misdemeanor, is there sanctioned. See cases in Wh. Cr. Pl. & Pr. §§ 290-1; Wh. Cr. L. 8th ed. § 1387.

A difficulty, however, in the way of this practice, was started in Massachusetts in *Com. v. Kingsbury*, 5 Mass. 106. A conspiracy, it was said, to commit either a misdemeanor or felony, merges in the overt act, when such overt act appears to have been consummated. The case before the court was one of a conspiracy to commit a felony, and to this class the decision should be confined. To extend it to misdemeanors, is in conflict with the English text books, where such a doctrine is never broached, as well as with the books of precedents, where forms constantly occur of conspiracies to commit misdemeanors to which the overt act is attached. In Massachusetts, in fact, the doctrine of merger, in cases of misdemeanor, has been put an end to by Rev. Sts. ch. 137, § 11; *Com. v. Drum*, 19 Pick. 479; *Com. v. Goodhue*, 2 Mete. 193. In New York, Maine, Michigan, and Pennsylvania, the doctrine of merger has in such cases been repudiated (*People v. Mather*, 4 Wend. 265; *Marcy, J.*; *Com. v. Hartmann*, 5 Barr, 60; *State v. Murray*, 15 Maine R. 100; *State v. Mayberry*, 48 Maine, 216; *State v. Noyes*, 25 Vt. 415; *People v. Richards*, 1 Mann (Mich.), 216, and other cases cited, Wh. Cr. L. 8th ed. § 1346), and throughout the country it is the constant practice to sustain verdicts in cases where counts for conspiracy to commit misdemeanors (*e. g.* obtaining goods by false pretences or the sale of lottery tickets) have been supported by evidence of the actual commission of the constituent offence. "It is supposed," said *Marcy, J.* (4 Wend. 265), "that a conspiracy to commit a crime is merged in the crime where the conspiracy is executed. This may be so where the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and where its object is only to commit a misdemeanor, it cannot

be merged. Wherever crimes are of equal grade there can be no technical merger. This court had this question under consideration in the case of *Bruce*, and there intimated an opinion that a conspiracy to commit a misdemeanor was not merged in the misdemeanor when actually committed." See *Wh. Cr. L.* 8th ed. § 1346.

In those states where conspiracy is made a statutory felony, and where the doctrine of merger is still recognized, great difficulty may arise in trying misdemeanors in all cases where two or more persons are proved to have joined in the commission of the offence. If there was joint action, must there not have been joint concert, and if so, must there not have been a conspiracy, and is not the misdemeanor merged?

Under conspiracies to commit misdemeanors will be treated :—

(1) *Conspiracies to violate the false pretence laws.* See *Wh. Cr. L.* 8th ed. § 1348, etc.

The leading case on this point is *R. v. Gill* (2 C. & Al. 204), in which an indictment which will appear in the text (611) was sustained, which merely charged the defendants with conspiring, "by divers false pretences and subtle means and devices, to obtain and to acquire to themselves, of and from P. D. and G. D., divers large sums of money, of the respective moneys of the said P. D. and G. D., and to cheat and defraud them respectively thereof." This was broad doctrine, as there are few conspiracies to defraud, which could not be forced into the form thus sanctioned, and it is evident that under it the defendant has scarcely any notice of the offence which he is about to meet. So strongly was this objection felt, that notwithstanding the remarks of Lord Mansfield, that no other form could be had for an undigested conspiracy to obtain goods in this manner, the courts over and over again lamented the latitude of the precedent, and attempted in particular cases to so far restrain it as to prevent its working an injury to the defence. Thus in *R. v. Parker* (11 Law J. N. S. 102, M. C.; 3 Q. B. R. 202; 2 G. & D. 709), Williams, J., declared that "it has been always thought that in *R. v. Gill*, the extreme of laxity was allowed." In *R. v. Peck* (9 A. & E. 686, 1 Per. & D. 508), an indictment was held bad from want of a due specification of the means, which charged the defendant with "unlawfully conspiring to defraud divers persons, who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit." So also a count which alleged that the defendants conspired, "by divers false, artful, and subtle stratagems and contrivances, as much as in them lay, to injure, oppress, aggrieve, and impoverish E. W. and T. W., and to cheat and defraud them of their moneys," was pronounced by the court of King's Bench incapable of sustaining a verdict. *R. v. Biers*, 1 A. & E. 327; *Wh. Cr. L.* 8th ed. § 1348. See also *R. v. Parker*, 11 Law J. N. S. 102, M. C.; *King v. R.*, 7 A. & E. 721; cited *Wh. Cr. L.* 8th ed. § 1348; and *R. v. Richardson*, 1 M. & Rob. 402. In none of these cases, however, was the object of the conspiracy an offence *per se* indictable, and though in each of them the court animadverted with great pungency upon a laxity of pleading which gave the defendant no notice of what he was to be tried for, yet there was an express recognition of the distinction between a conspiracy to commit an indictable offence, where the means need not be set out, and a conspiracy to commit an act unindictable, where the means must appear. But in *R. v. King*, decided in the king's bench, and afterwards in the exchequer, in 1844 (7 A. & E. 721), the principle of *R. v. Gill* was broadly affirmed to be good by the several judges; and though the cases were reversed in the exchequer on another point, viz., that the particular parties sought to be defrauded should have been set out (a point which will be noticed in the next note), the judge who gave the opinion in the latter court yielded a tacit acquiescence in the sufficiency of the allegation in controversy. In the king's bench, Lord Denman said: "I am of opinion that this count is sufficient. The general form used in *R. v. Gill* (2 B. & Al. 204) has constantly been held good. Holroyd, J., says there: 'The conspiracy is the offence, and it is quite

sufficient to state only the act of conspiring and the object of the conspiracy in the indictment. Here it is stated that the parties did conspire, and that the object was to obtain by false pretences money from a particular person. Now a conspiracy to do that would be indictable, even where the parties had not settled the means to be employed.' He does not lay it down that a conspiracy must be alleged to defraud a person described by name. And there are many cases where parties may conspire to injure others, without anticipating who the particular persons will be. I am not prepared, therefore, to say that the first part of this count is not good. But, if it were not so, *R. v. Spragge* (2 Burr. 999) shows that the overt acts may support it. The objection, that the individuals mentioned to have been affected by them are not shown to be those against whom the defendants conspired, is answered by the remark made before, that, in the conspiring, particular individuals may not have been contemplated. It was argued that the overt acts limit the allegation in the first part of the indictment, and that, even if that showed a criminal conspiracy, the statements afterwards reduce it to something not indictable. But I think that result does not follow, even if the overt acts alleged are innocent; the only object of those being to give information of the particular facts by which it is proposed to make out the conspiracy, and the mode in which the prosecutor asserts that it was carried into effect. As to the last paragraph, I think it does not contain any distinct charge, but is only an unnecessary summing up." *Patterson, J.*: "I also think that the count is good. The general rule as to naming parties, laid down by Mr. Starkie, applies only where, from the nature of the case, there is a person to be named; in conspiracy, for example, where the defendants have conspired to injure some given person; but, if the conspiracy is to cheat any persons out of all mankind, the rule cannot be applied. In *R. v. De Berenger* (3 M. & S. 67) no one could know who would be the purchasers of stock of a future day. So, here, it was not known whose goods would be obtained in pursuance of the conspiracy; and it appears by the overt acts that the defendants obtained certain goods of A., B., and C., and other goods from 'divers other tradesmen, the liege subjects,' etc., 'whose names are to the jurors unknown,' etc. Therefore, I think that the part of the indictment charging the conspiracy is good, though it does not name the persons to be defrauded. That it does not particularly specify the means, is no objection, according to *R. v. Gill*. So the indictment stands, independently of the overt acts. As to these, when the present motion was made, I understood the objection to be rather that the overt acts were not consistent with the general charge, than that they were insufficient to support a charge of conspiracy. It is contended that false pretences are alleged, and the pretences not negatived. But no false pretence, in the sense alluded to, is laid throughout the indictment. In the ordinary case of indictable false pretences, the pretence is laid as having been made to the person whose goods are obtained; but that is not so here; the averment is only that some of the defendants pretended that debts were due to two of them from a third, in whose possession the goods were, and then that, in pursuance of the conspiracy, and for the purposes stated, the two commenced actions against the third for such fictitious debts, and obtained judgment and execution, under which the goods were removed before the times of credit had expired. That is a complete allegation of a fraud upon the sellers; and the argument that no such fraud appeared was founded upon a fallacy, the defendant's counsel arguing upon each alleged act without reference to its being laid as done in pursuance of the conspiracy." See also remarks of Lord Denman, C. J., in *R. v. Kenrick*, *infra*, 611, note.

In a case decided in 1846 (*R. v. Gompertz*, 11 Jurist, 204; 9 A. & E. 1, the material portions of which are printed in 6 Pa. L. J. 377 (Wh. Cr. L. 8th ed. § 1348), and the indictment in which, and the reasoning of the court upon it, are given *infra*, 615), the court of king's bench, by solemnly affirming *R. v. Gill*, has put to rest the question of the propriety of the indictment in the latter case. There were eight counts in the indictment in *R. v. Gompertz*, the latter of which, as will be observed, charged the defendants with conspiring, "by

divers false pretences and indireet means, to cheat and defraud the said S. P. R. of his moneys, to the great damage, fraud, and deceit of the said S. P. R., to the evil example," etc. There was a verdict for the crown on each of the counts, before Lord Denman, C. J., at the Middlesex sittings, and on December 17, 1846, a motion for a new trial was argued before the court in banc. "First, we think," said Lord Denman, in giving the opinion of the court, "that there is no ground for arresting the judgment in this case; one count is good, on the authority of *R. v. Gill* (2 B. & Al. 204), never overruled, but founded on excellent reason, and always recognized, though not without regret, because that form of indictment may give too little information to the accused. A fair observation was made upon the manner in which that precedent was treated in *R. v. Biers* (1 A. & E. 327), but, even from the expressions there used, and much more from what has been said in later cases, it appears plainly that the court has never doubted the correctness of the decision in *R. v. Gill*." In subsequent cases, the same rule was solemnly reaffirmed. See also *infra* (611a). It is therefore settled in England that it is sufficient to charge the defendants with a conspiracy to defraud the prosecutor of his moneys, "by divers false pretences and indireet means;" and the only positive qualifications which have been grafted on the principle, are, *first*, that it must appear from the indictment that the property sought to be obtained was not the property of the defendant (*R. v. Parker*, 11 Law J. N. S. 102, Mag. C.; 3 Q. B. 292; 2 G. & D. 709; *R. v. Carlisle*, 6 Cox, C. C. 366; *Dears*, 337; 25 Eng. Law & Eq. R. 577); and *secondly*, that if the indictment be general, the court will order the prosecutor to furnish particulars of the charges to be relied on, though it will not compel him to state the specific acts to be proved, and the time and place at which they are alleged to have occurred. *R. v. Hamilton*, 7 C. & P. 448; Wh. Cr. L. 8th ed. § 1386. See *infra*, 615, where the indictment and proceedings in the latter case are given. See, also, *infra* (611a), for a form of an unexecuted conspiracy to cheat, sustained by the court of criminal appeal. For more recent cases, see Wh. Cr. L. 8th ed. § 1348.

In this country, the sufficiency of the form sustained in *R. v. Gill* has been greatly discussed. For many years, no doubt was entertained as to its correctness (see cases cited Wh. Cr. L. 8th ed. § 1348). In several states it continues now to be considered as abundantly adequate to sustain a conviction on a motion in arrest of judgment. *State v. Buchanan*, 2 Har and J. 317; *State v. Devit*, 2 Hill. S. C. R. 282; *State v. Bartlett*, 30 Maine, 132; Wh. Cr. L. 8th ed. § 1348. Some years ago, however, it was thought to be shaken by cases in Pennsylvania and Massachusetts, which will be now considered.

In *Com. v. Hartmann*, 5 Barr, 60, the indictment charged the defendants with conspiring to violate that section of the act of 1842, abolishing imprisonment for debt, which made it a misdemeanor for a debtor to secrete his property with intent to defraud his creditors. How far the indictment shrank below the statutory standard, will be presently examined. Our first inquiry is whether there was anything in the reasoning of the court which would divert the application of the English doctrine to our own practice. After noticing the inadequacy of this indictment to sustain a conviction for the statutory offence, independent of the conspiracy, Gibson, C. J., said: "Now, though it may not be necessary in an indictment for conspiracy so minutely to describe the unlawful act where it has a specific name, which indicates its criminality, yet where the conspiracy has been to do an act prohibited by statute, the object which makes it unlawful can be described only by its particular features, and, without doing so, it cannot be shown that the confederates had an unlawful purpose. It may be said that the form of a criminal purpose, meditated but not put in act, can seldom be described; but it can be as readily laid as proved." It is true, that in a preceding passage exception was taken to the omission of the indictment to describe the place where the secreted goods were kept, or the person who had them in custody, or the time and place of the transaction, and it was urged that, as a conspiracy to secrete goods abroad, having for its object no infraction of the laws of Pennsylvania,

would not be criminal in Pennsylvania, such an hypothesis should be distinctly excluded by the record. But it will be no difficult matter to frame a count for a conspiracy in such a way as to meet these difficulties, without essentially varying from the precedent in *R. v. Gill*. By charging that the defendants conspired "by divers false pretences and indirect means, which, not being perfectly matured, the jurors aforesaid cannot set out in detail, then and there to cheat and defraud the said A. B. of his goods," etc., describing them as exactly as possible, it is submitted that the technical obstacles arising from *Com. v. Hartmann* may be surmounted. Certainly, when the exceeding liberality of pleading is considered, which was recognized by the supreme court in *Com. v. Eberle*, 3 S. & R. 9; *Com. v. McKisson*, 8 S. & R. 420; *Com. v. Gillespie*, 7 S. & R. 469; *Com. v. Collins*, 3 S. & R. 220; *infra*, 612; *Com. v. Clary*, 4 Barr, 210; *Com. v. Mifflin*, 5 W. & S. 461—cases which will be examined more fully under their appropriate heads—the precedent given in *R. v. Gill*, with the qualifications which have been just noticed, must be treated as of as yet unimpaired validity in Pennsylvania. This, in fact, was subsequently judicially decided. *Rhoades v. Com.*, 15 Penn. St. 272; *Clary v. Com.*, 4 Barr, 210; *Twitchell v. Com.*, 9 Barr, 211; *Hazen v. Com.*, 23 Penn. St. 355; *Com. v. McGowan*, 2 Pars. 341. In 1854, on a conviction for a conspiracy to "solicit, induce, and procure" the officers of a particular bank to "violate and disobey the 48th and 49th sections of the act of 16th of April, 1850," prohibiting the circulation of foreign notes under §5, the supreme court declared the conviction good, and that it was not necessary for the indictment to do more than aver a conspiracy for this purpose, without setting forth the means or overt act. "In an indictment for a conspiracy to do an act prohibited by the *common law*," said Lewis, C. J., "where the act has a specific name which indicates it, it is not necessary to describe it minutely. But it has been thought that where the object of the conspiracy is merely forbidden by the statute, it can be described only by its particular features. *Com. v. Hartmann*, Lewis, U. S. Crim. Law, 223, 5 Barr, 63. But even in offences of this character, it has never been held necessary to set forth the unlawful object with the precision required in an indictment for perpetrating it." *Hazen v. Com.*, 23 Barr, 362. See, generally, Wh. Cr. L. 8th ed. § 1348, and rulings cited *infra*, pp. 117–120.

In Massachusetts, an indictment charging merely a conspiracy to "cheat and defraud," without averring any means to effect the purposes, such as would show the object to be illegal, is bad. The law in that state now is, that it is necessary to aver in what the conspiracy to cheat and defraud consists. *Com. v. Eastman*, 1 Cush. 191; *Com. v. Shedd*, 7 Cush. 515; *Com. v. Prius*, 9 Gray, 127. This rule is followed in Maine and New Hampshire; *State v. Mayberry*, 48 Me. 216; *State v. Parker*, 43 N. H. 83. To the same effect are *State v. Jones*, 13 Iowa, 269, and *State v. Reach*, 40 Vt. 113; *Isaacs v. State*, 48 Miss. 234. In Maryland (*State v. Buchanan*, 2 Har. & J., 317, *infra*, 318; *State v. Bloomer*, 48 Md. 321), and in South Carolina (*State v. Dewitt*, 2 Hill, 282), the reasoning of *R. v. Gill* is virtually recognized. From the action of the supreme court of New Jersey (in *State v. Rickey*, 4 Halst. 293), a contrary doctrine, it is true, is sometimes attempted to be drawn; but it will appear, first, that in *State v. Rickey* the indictment was constructed on a different principle from that in *R. v. Gill*; and secondly, that the reasoning of the court in *State v. Rickey* rested principally on the assumption that the revised statutes of New Jersey limited conspiracies to the single act of getting an innocent man indicted by malice and false evidence. The indictment charged that the defendants conspired "to obtain large sums of money and bank bills, the property of the president, directors, and company of the State Bank at Trenton, by means of the several checks and drafts of the said" defendants "respectively, to be drawn on the cashier of the said the president, directors, and company of the State Bank at Trenton, when they, the said" defendants "had no funds in said bank for the payment of the said checks and drafts." Overt acts followed, none of them showing a specific misdemeanor; and, with so lax a statement of the cause of prosecution, there is no ground for surprise that the

court thought proper to quash the indictment, even had the statutory objection not obtained. There is no averment that the defendants *knew* they had no funds in the bank; there is no averment that they were to have no funds ready at the time the checks were presented. The indictment was to be treated in the same way as if it had charged the defendants with an attempt to "defraud" an individual by drawing bills on him when they had no funds in his hands. To make the offence a misdemeanor, it would be necessary to introduce averments showing that by some fraudulent means the bank was to be induced to believe that the defendants really had funds in its custody. Now it is plain, that unless the drawing checks on a bank where the drawer has no funds, is made penal by statute in New Jersey, the indictment in *State v. Rickey* was too broad. It showed a conspiracy to effect an object neither *per se* indictable, nor a misdemeanor at common law. If such had been the case the indictment, on the ruling of *R. v. Gill*, would have been good. The same reasoning may be applied to *Lambert v. People* (7 Cowen, 167; 9 Cowen, 578), where the indictment was even more general, it merely charging the defendants with conspiring "*wrongfully, injuriously, and unjustly, by wrongful and indirect means, to cheat and defraud*" the prosecutors "of their goods and chattels and effects," etc. This is certainly loose pleading, but, bad as it was, it was sustained in the supreme court, and the judgment on it only reversed in the court of errors, after a vigorous struggle, by a majority of one. As following the latter ruling may be cited *People v. Brady*, 56 N. Y. 183. In this case, Andrews, J., said: "It" (the reversal in the court of errors) "has not been overruled in this state; and the legislature has since adopted this principle of the case in defining the offence of conspiracy."

An examination of the American as well as the English cases, in conclusion, goes to establish the doctrine of *R. v. Gill*, that, in a jurisdiction where a statute of false pretences exists, and there is no statutory definition of conspiracy, it is enough to charge the defendants with conspiring, "by divers false pretences" (stating them as far as possible, and if impossible excusing on the ground that they were at the time of presentment unknown), to obtain the prosecutor's goods. *People v. Clark*, 10 Mich. 310. Wh. Cr. L. 8th ed. § 1348, where the cases are examined in detail. But to charge a mere conspiracy to "cheat and defraud," and no further, is in most jurisdictions defective. *State v. Mayberry*, 48 Me. 219; *State v. Parker*, 14 N. H. 83; *Com. v. Eastman*, 1 Cush. 191; *State v. Jones*, 13 Iowa, 269.

That an indictment will not lie for a conspiracy to commit a civil trespass, see Wh. Cr. L. 8th ed. § 1350.

(2) *Conspiracies to violate the lottery laws.*

The only cases in the books of conspiracies of this class arise in Pennsylvania, and were produced by the rigor with which the courts in that State applied the doctrine of variance to the setting out of lottery tickets. When the intentional complexity of lottery tickets is taken into consideration, it is no wonder that the pleader, under the pressure of a rule which held "*Burrill*" for "*Burrall*" to be a fatal variance in the setting forth of the ticket, should insure beforehand against any vices in the statutory count by adding to it a count for conspiracy. This device was countenanced by the supreme court in *Com. v. Gillespie*, 7 S. & R. 469, a case virtually resting on the authority of *R. v. Gill*, discussed in the previous paragraph, and reaffirmed in *Hazen v. Com.*, 23 Penn. St. 364; see *infra*, 624. See Wh. Cr. L. 8th ed. § 1352. The defendants in *Com. v. Gillespie* were charged, in eight out of nine counts, with the statutory offences of selling lottery tickets, offering them for sale, and advertising them—some of the counts setting out tickets in full, others merely charging the sale of "a lottery ticket," etc., in the language of the act. The first count was for a conspiracy to "sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket and tickets, in a lottery not authorized by the laws of the commonwealth;" therein precisely following the statute. On motion for new trial, and in arrest of judgment, the court held: 1. That the counts, stating the offence in the words of the statute, without setting forth the ticket, were bad from want of sufficient particu-

larity; 2. That there must be a new trial on the count setting forth the ticket, in consequence of a variance between the ticket and the indictment; but, 3. That the conspiracy count was enough to sustain a conviction at common law. This was in 1822; and in 1827, on a conviction on an indictment containing both classes of counts, one defendant, in the conspiracy counts, being charged with conspiring with others to the grand jury unknown, the court inflicted the statutory punishment, being a fine to the Union Canal Company on the statutory counts, and a fine at common law on the conspiracy counts. *Com. v. Sylvester*, 6 Penn. L. J. 283; Bright. R. 334; 4 Clark Penn. L. J. R. 31. Two points may be extracted from these cases: 1. That though, under the lottery statute in force at the time, the indictment must go inside of the words of the statute, and set out the tenor of the ticket, yet, for a conspiracy to effect the sale of such a ticket, it is enough to pursue the statute alone, without the specification of detail; 2. That the conspiracy, when properly pleaded, will be punished as a common law offence, independent of the statutory penalty. The first point is abundantly illustrated in the argument of Duncan, J. After showing that to transcribe the language of the act was not the proper way to frame a count for the consummated misdemeanor, he proceeded to recognize the distinction indicated by Lord Mansfield, in *R. v. Eccles*, between a conspiracy to commit an offence, and its actual commission. "But the same reason does not apply to the first count, for the conspiracy itself is the crime. It is different from an indictment for stealing, or action for trespass, where the offence consists of an act done, which it is clearly within the power of the prosecutor to lay with certainty. The conspiracy here was, to sell prohibited lottery tickets, any that he could sell, not of any particular lottery, but of all. The conspiracy was the *gravamen*, the *gist* of the offence." 7 S. & R. 476. The second point is established by the fact that though, at the time the cases in question were determined, the statutory punishment on the sale of lottery tickets was a fine to the Union Canal Company, the sentence imposed on the conspiracy counts was a fine at common law to the state. This position, however, may be considered as qualified, in Pennsylvania, by *Com. v. Hartmann*, 5 Barr, 60, by which it is determined that a conspiracy to commit a statutory offence is never to be punished more heavily than the offence itself. See fully Wh. Cr. L. 8th ed. § 1352.

(3) *Conspiracies to violate the laws which make it penal in a creditor to secrete his goods with intent to defraud his creditors.*

The 26th section of the New York act "abolishing imprisonment for debt," Sessions Laws of 1831, p. 402, provides that "any person who shall remove any of his property out of any county, with intent to prevent the same from being levied on by any execution, or who shall secrete, assign, convey, or otherwise dispose of any of his property with intent to defraud any creditor, or to prevent such property being made liable for the payment of his debts, and any person who shall receive such property with such intent," etc., "shall, on conviction, be deemed guilty of a misdemeanor." This section, so far as it goes, was literally transcribed and enacted by the legislature of Pennsylvania in the act of 12th of July, 1842, section 20, but not until it had received, so far as the pleading part is concerned, a definite construction by New York courts in the case of *People v. Underwood*, 16 Wend. 546. That case (which is given in substance, *supra*, 507) sanctioned the form of indictment previously in use, which has been placed in the text. *Ib.* In New York, therefore, an indictment for a conspiracy to violate the provisions of this act would be good which follows the language of the precedent given, *ante*, 229. In Pennsylvania, under *Com. v. Hartmann*, 5 Barr, 60, which has been already noticed, the same particularity is required, it being held that an indictment charging the defendant with "removing and secreting divers goods and merchandises of the value of \$5000, the description, quantity, and quality of the said merchandises being yet unknown," is bad. "Neither time, place, nor circumstances," said the chief justice, "are given, and the goods are not attempted to be described by the place where they were kept or by the person who had them in custody. They may even not have been

in the state, and a conspiracy to secrete them abroad, having for its object no infraction of our laws, would not be criminal at home. It is not averred even that the defendants had any merchandise at all, here or elsewhere; and, unless they had it, a conspiracy to conceal it would have been a conspiracy to do what was impossible. It might be inferred, from the motive imputed, that they had it; but Hawkins says (b. 2, s. 35, c. 60) that 'in an indictment nothing material shall be taken by intendment or implication.' Nor are all the creditors named whom the defendants are charged with having conspired to defraud. The prosecutors are named, 'with divers other persons' not named; but, unless the additional clause were rejected as surplusage at the trial, the accused would be called upon to defend themselves in the dark."

(4) *Conspiracies to commit breaches of the peace.*

An indictment for this character will be found in the text, and within the same general class may be regarded cases which will be subsequently considered in another relation, viz., conspiracies to hiss an actor from the stage (Macklin's case, noticed in *Clifford v. Brandon*, 2 Campb. 369); and to prevent by violent means the introduction of the English language into a church. *Com. v. Eberle*, 3 S. & R. 9. See Wh. Cr. L. 8th ed. § 1353, where the above cases are discussed.

(5) *Conspiracies to produce abortion.*

Counts falling under this head, which were sustained by the supreme court of Pennsylvania, in *Com. v. Demain*, 6 Pa. L. J., Bright's R. 44, *infra*, 629, will appear in the text. In consequence of the immorality of the overt act, which would make a conspiracy to commit it in any of its phases indictable, it is unnecessary to aver specifically in what stage of pregnancy was the mother, or what were the instruments to be used. It is hard, also, to conceive of a conspiracy to commit an abortion that would not involve as a contingency a conspiracy to commit a statutory offence. If the conspiracy was unexecuted, it would be better, on a principle which will be discussed more fully hereafter, for the grand jury to aver that they are unable to set out the particulars of the plan, because it was never carried into execution. See Wh. Cr. L. 8th ed. § 1364.

(6) *Conspiracies to publish forged notes.*

An indictment for a conspiracy of this nature was sustained in *Clary v. Com.*, 4 Barr, 210, and will appear hereafter in the text. *S. P. Com. v. McGowan*, 2 Parsons, 34. Such an indictment on the authority of this case is good where the bank is foreign and no overt act is stated. See Wh. Cr. L. 8th ed. § 1357.

(7) *Seditious conspiracies.*

This branch of conspiracies will be fully examined under the head of treason and sedition. See Wh. Cr. L. 8th ed. § 1356.

In O'Connell's case, a count charging in substance a conspiracy "to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitution of this realm," was held by all the judges not to show with sufficient certainty the object of the defendants to be illegal. *R. v. O'Connell*, 11 Cl. & Fin. 15; 9 Jurist. 30.

II. *Conspiracies to make use of means themselves the subject of indictment, to effect an indifferent object.* See Wh. Cr. L. 8th ed. § 1358.

This class is here separately mentioned because it has usually been placed under a distinct head by text writers, though on principle it is difficult to distinguish it from cases where an offence conspired to be committed is the direct and immediate object of the conspiracy. In the latter case the defendants conspire to commit an indictable offence for the sake of itself, in the former they conspire to commit it for the sake of some other object; but where the cases usually put under the first head are analyzed, they will be found, many of them, to fall under the second. Thus in conspiracies to procure the marriage of a young woman by false personation, to procure an appointment by corruption, to make a change in government by seditious means, the end may not be criminal, yet, as the means are criminal, the conspiracy is to commit a crime. It is enough to say, therefore,

that as the conspiracy rests in each case on the alleged indictability of the constituent criminal offence, such offence must in every instance be specifically designated. See 1 Leach, 38; 3 Burr. 439; 1 Wils. 41; 8 Mod. 321, and cases cited Wh. Cr. L. 8th ed. § 1358.

III. *Conspiracies to do an act, the commission of which by an individual is not indictable, but the commission of which by two or more in pursuance of a previous combination, is calculated—*

1st. *To defraud an individual by fraudulent and indirect devices.* Indictability in such cases is based on the means constituting a common law cheat. Wh. Cr. L. 8th ed. § 1347.

2d. *To commit an immoral act, such, for instance, as the seduction of a young woman.* In such cases, indictability is based on the fact that the conspiracy if executed would involve contingently a criminal act. Wh. Cr. L. 8th ed. § 1363; *infra*, 651, 652, 653, etc.

3d. *To prejudice the public or the government generally, as, for instance, by unduly elevating or depressing the prices of wages, of toll, or of any merchantable commodity, or by defrauding the revenue.* *Infra*, 657, etc.; Wh. Cr. L. 8th ed. § 1366.

4th. *To falsely accuse another of crime, or use other improper means to injure his reputation, or extort money from him.* Wh. Cr. L. 8th ed. § 1376.

5th. *To impoverish another in his trade or profession.* *Infra*, 659, etc.; Wh. Cr. L. 8th ed. § 1371 *et seq.*

6th. *To pervert the course of justice.* Wh. Cr. L. 8th ed. § 1380.

Indictments falling under each of these heads will be found in the text, and the authorities arising under them will be presently examined. There are, however, one or two general principles, extracted from the authorities, which it is desirable to consider in advance.

1. Where the conspiracy is executed, it is better that the facts should be stated specially, so that not only will the record present a graduated case for the sentence of the court, but the case, when it goes to the jury, will not be open to the objection that where the grand jury had it in their power from the examination of the witnesses for the prosecution to find specially the agency through which the conspirators were to work, they confined themselves to a general finding of an unexecuted conspiracy. It is not pretended that any of the cases go so far as to prescribe this doctrine, nor is it denied that very frequently, especially in the earlier cases, the courts sustained counts for unexecuted conspiracies (*e. g.*, as in cases of conspiracies "to cheat"), where on the trial it turned up that the supposed naked conspiracy had been fully executed, and had resolved itself into an independent misdemeanor. But not only is it proper, as will presently appear, that the defendant should receive all practicable notice of the offence to be actually tried, but it may be argued with much force that between an attempt or a conspiracy to commit an offence, and the offence itself, there may be a variance. Hence it is more prudent for the pleader, when he has before him a case of consummated conspiracy to commit an offence not *per se* indictable, to set forth the facts specially. This is fully done in some of the precedents in the text, especially in the cases arising under the Bank of the United States' prosecutions in Baltimore. See *infra*, 618.

2. Where the conspiracy is unexecuted, and nothing more is likely to appear in evidence than a mere undigested confederacy on the part of the defendants to do the particular act, it is better to explain the fact of the non-setting out of the features of the offence, by stating that it never was consummated, and that thereby the jury were uninformed of its particular character. Thus, for instance, after considering the cases which will presently be examined, as well as those which have already been cited, no one can doubt that a conspiracy to cheat A. B., or to cheat the citizens of the state or city, is indictable, notwithstanding there is nothing disclosed on the part of the conspirators by which the particular agency through which they were to operate can be definitely pleaded. But in *R. v. King* (7 A. & E. 807), Tindal, C. J., pointedly intimates that

where the prosecutor is shown to have had it in his power to describe any of the objects of the conspiracy, a failure to do so is a sensible defect; and the leaning of his reasoning is to the position that where a material gap exists, the pleader should aver specially the reasons why the description of the offence is not complete. That this course is pursued in indictments for forgery, where the grand jury are unable to describe the exact terms of the forged instrument from the fact of its loss or destruction, is shown in *Wh. Cr. Pl. & Pr.* §§ 156-175, and the same reasoning applies to the present case with equal exactness. At all events, it would seem more prudent in cases of unexecuted conspiracy, where the object is a thing not *per se* indictable, to excuse by proper averments the non-setting forth of the ingredients of the offence. And whenever the court deem it necessary, a bill of particulars will be ordered which will supply the defendant with the facts on which the prosecution rests to establish the general offence. See *R. v. Kenrick*, per *Ld. Denman*, C. J., *infra*, 611, note, and cases cited in *Wh. Cr. Pl. & Pr.* § 187, for other cases. (*See for form of same, infra*, 615, note.)

"The several rules," said *Shaw*, C. J., in *Com. v. Hunt* (4 Metc. 125) "upon the subject, seem to be well established, to wit, that the unlawful agreement constitutes the gist of the offence, and therefore that it is not necessary to charge the execution of the unlawful agreement. *Com. v. Judd*, 2 Mass. 337. And when such an execution is charged, it is to be regarded as proof of the intent, or as an aggravation of the criminality of the unlawful combination.

"Another rule is a necessary consequence of the former, which is, that the crime is consummate and complete by the fact of the unlawful combination, and, therefore, that if the execution of the unlawful purpose is averred, it is by way of aggravation, and proof of it is not necessary to conviction: and therefore the jury may find the conspiracy, and negative the execution, and it will be a good conviction.

"And it follows as another necessary legal consequence, from the same principle, that the indictment must, by averring the unlawful purpose of the conspiracy, or the unlawful means by which it is contemplated and agreed to accomplish a lawful purpose, or a purpose not of itself criminally punishable, set out an offence complete in itself without the aid of any averment of illegal acts done in pursuance of such an agreement; and that an illegal combination, imperfectly and insufficiently set out in the indictment, will not be aided by averments of acts done in pursuance of it.

"From this view of the law respecting conspiracy, we think it an offence which especially demands the application of that wise and humane rule of the common law, that an indictment shall state, with as much certainty as the nature of the case will admit, the facts which constitute the crime intended to be charged. This is required to enable the defendant to meet the charge and prepare for his defence, and, in case of acquittal or conviction, to show by the record the identity of the charge, so that he may not be indicted a second time for the same offence. It is also necessary, in order that a person charged by the grand jury for one offence may not substantially be convicted on his trial of another. This fundamental rule is confirmed by the declaration of rights, which declares that no subject shall be held to answer for any crime or offence until the same is fully and plainly, substantially and formally described to him.

"From these views of the rules of criminal pleadings, it appears to us to follow, as a necessary legal conclusion, that when the criminality of a conspiracy consists in an unlawful agreement of two or more persons to compass or promote some criminal or illegal purpose, that purpose must be fully and clearly stated in the indictment; and if the criminality of the offence, which is intended to be charged, consists in the agreement to compass or promote some purpose, not of itself criminal or unlawful, by the use of fraud, force, falsehood, or other criminal or unlawful means, such intended use of fraud, force, falsehood, or other criminal or unlawful means must be set out in the indictment. Such, we think, is, on the whole, the result of the English authorities, although they are not quite uniform. 1 East, P. C. 461; 1 Stark. C. P. 1 (2d ed.), 156; opinion of *Spencer*, senator, 9 Cow. 586 *et seq.*

“In the case of a conspiracy to induce a person to marry a pauper, in order to change the burden of her support from one parish to another, it was held by Buller, J., that as the marriage itself was not unlawful, some violence, fraud, or falsehood, or some artful or sinister contrivance must be averred, as the means intended to be employed to effect the marriage, in order to make the agreement indictable as a conspiracy. *Rex v. Fowler*, 2 Russ. on Crimes (1st ed.) 1812; S. C., 1 East P. C. 461.

“Perhaps the cases of *The King v. Eccles* (3 Dougl. 337), and *The King v. Gill* (2 B. & Al. 204), cited and relied on as having a contrary tendency, may be reconciled with the current of cases, and the principle on which they are founded, by the fact, that the court did consider that the indictment set forth a criminal, or at least an unlawful purpose, and so rendered it unnecessary to set forth the means, because a confederacy to accomplish such purpose, by any means, must be considered an indictable conspiracy, and so the averment of any intended means was not necessary.

“With these general views of the law, it becomes necessary to consider the circumstances of the present case, as they appear from the indictment itself, and from the bill of exceptions filed and allowed.

“One of the exceptions, though not the first in the order of time, yet by far the most important, was this:—

“The counsel for the defendants contended and requested the court to instruct the jury that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by any specified criminal means, and that the agreement therein set forth did not constitute a conspiracy by any law of this commonwealth. But the judge refused so to do, and instructed the jury that the indictment did, in his opinion, describe a confederacy among the defendants to do an unlawful act, and to effect the same by unlawful means; that the society organized and associated for the purposes described in the indictment, was an unlawful conspiracy against the laws of this commonwealth; and that if the jury believed, from the evidence in the case, that the defendants, or any of them, had engaged in such a confederacy, they were bound to find such of them guilty.”

In *Com. v. Barger*, Legal Int. July 2, 1880, the question is thus satisfactorily and philosophically discussed by Hare, P. J.: “The indictment in this case alleges, that Charles Barger and Charles Huffnagle did unlawfully, fraudulently, and maliciously combine, confederate, and agree together, by divers unlawful, fraudulent, and malicious means, devices, pretences, and representations, to cheat and defraud, and obtain from one Jacob Sullivan, one horse of the value of \$150, and that in pursuance of the said fraudulent conspiracy and agreement, they, the said defendants, did, by the aforesaid false fraudulent devices, pretences, and representations, cheat and defraud, and obtain from the said Jacob Sullivan, a horse of the value of \$150, contrary to the form of the act of assembly in such case made and provided.

“The defendants were tried and convicted, and a motion is now made in arrest of judgment on the ground that the indictment is uncertain, and does not set forth the alleged offence with sufficient clearness. Various arguments were used in support of this position, and among them that a conspiracy to cheat is a statutory offence, and must be so described in pleading as to show that it comes within the statute; and that where, as in the case before us, the indictment avers that the alleged conspiracy was carried into execution, it must set forth the means employed.

“The subject, though apparently simple, is complicated by distinctions which have their foundation in good sense, and must not be confounded, if we wish to arrive at a correct judgment. It may be considered under the following heads: 1st. Where the end which the alleged conspirators have in view is criminal, and punishable as such at common law. 2d. Where it is innocent, and the offence consists in an agreement to accomplish it by unlawful means. 3d. Where, though not criminal at common law, it is made punishable by statute. 4th. Where the accused are charged with combining to effect an end, which, though unlawful,

would not have been criminal had it been the act of one—as where it is agreed that A. shall tell a falsehood with intent to cheat, and B. corroborate it. 5th. Where combining to effect an unlawful purpose has been made punishable by statute, without regard to the means employed, if they are such as tend to the accomplishment of the end.

“All the authorities concur that where the offence charged is an agreement to commit a crime, it is not necessary to set forth the intended means, because these may be known only to the guilty parties, and may vary with time, or as opportunity offers. It is the common and guilty purpose which constitutes the crime, and if that is clearly alleged in the indictment, and established to the satisfaction of the jury, conviction and sentence should follow in due course. It is not less clear under the authorities and on principle, that an indictment for a conspiracy to effect a lawful object is demurrable unless it avers that the parties agreed to use some unlawful means, which must be described with certainty as being the gist of the offence. The question which arises under the third head is more complicated, but seemingly depends on whether the statute makes the act punishable at all events, or only when it is accomplished by certain means; for in the latter case, what is really forbidden is the means, and these must be set forth in order to show that the defendants designed to violate the statute. The 4th head presents the following question. Is a joint scheme to defraud punishable at common law, irrespective of the means by which the parties intend to carry it into effect? It is no doubt true, as the defendants contend, that a simple lie, uncorroborated by a device or false token, is not an indictable offence, even when it is used as an instrument of injury or fraud; but the case is obviously different, where two or more persons agree to unite in a fraudulent design, whether it is to be carried out by misrepresentations in which both combine, or by some more elaborate contrivance. The better opinion would seem to be that such a conspiracy is criminal *per se*, and if so, nothing more is requisite than to allege and prove that it exists.

“Whatever may be thought on this point it would seem plain that where a statute declares that it shall be criminal to conspire for the attainment of a certain end, it will be enough to aver that the parties so agreed contrary to the statute, and the pleader need not set forth the means by which they proposed to make their intent effectual. The combination is in such cases the forbidden thing, and the means, incidents, which are not of the essence of the offence. The case before us comes within this principle, because the criminal code of this state declares that, ‘If any two or more persons shall falsely and maliciously conspire and agree to cheat and defraud any person or body corporate, of his or their moneys, goods, chattels or other property, or to do any other dishonest, malicious, and unlawful act, to the prejudice of another, they shall be guilty of a misdemeanor, and, on conviction, be sentenced to pay a fine, not exceeding five hundred dollars, and to undergo an imprisonment, by separate or solitary confinement at labor, or by simple imprisonment, not exceeding two years.’ The commonwealth is obviously entitled to a conviction under the provisions of this statute on the due allegation and proof of such a combination to defraud, as it was the intention of the legislature to prohibit, without setting forth or particularizing the way which the accused proposed or agreed to take for the accomplishment of their design.

“It is nevertheless contended for the defence, that if such is the rule where the offence charged is simply a conspiracy to commit an unlawful act, it does not apply in cases like the present, where the criminal design is alleged to have been executed, because the means employed then appear with certainty, and should be set forth for the information of the accused, and that they may come into court prepared to meet the charge. The fallacy of this argument lies in not observing that the method taken for the accomplishment of such a design may be suggested by the occasion, and quite different from that on which the conspirators originally agreed. Obviously the parties may deviate from their plan at the last moment, or simply resolve to practise a deceit and trust to their ingenuity to find out the

way, and if the jury are required under these circumstances to say that the accused agreed on the means as well as the end, the result may be an acquittal where it is least deserved. If A. engages B. to inflict some serious personal injury on C. and B. sends C. a package of fulminating powder which explodes in his hands, the indictment cannot allege that the means thus employed entered into or were a part of the joint design, without the risk of a variance, because it may well be that A. prudently left the execution of the plot to B. and knew not the contrivance which the latter had devised until it was disclosed by the event. What then, it may be asked, is the justification for alleging, as in this indictment, that the conspirators not merely planned, but executed the wrongful act? One answer is, that the precedents authorize this mode of pleading; but the essential reason seems to be, that showing that the defendants united in the commission of a fraud or other illegal act, is evidence that they did so in pursuance of a previously formed design, and thus strengthens the proof of a conspiracy, which is the substantive offence. Such a method of pleading and evidence tends to bring the whole case before the court and jury, and enable them to view it in its true light as one transaction.

"The conclusion reached above is, so far as I can discern, an inevitable inference from *The Com. v. Eberle*, 3 S. & R. 9, and *The Com. v. Gillespie*, 7 Id. 469, which were followed not long since in *Hazen v. The Com.*, 11 Harris, 355; and although dicta looking the other way may be found in *Hartman v. The Com.*, 5 Barr, 65, the point was not necessarily before the court, which assigned other grounds that are amply sufficient to support the judgment.

"The divergence of this opinion from a decision lately made by one whose judgment I much respect, is to me a cause of unfeigned regret, and I would willingly follow his lead did I not think myself bound by precedents which appear to me to point in a different direction. The subject is obscure and complicated, and cannot be finally or authoritatively determined save by the court of last resort. The motion in arrest of judgment is dismissed."

To same effect, see *U. S. v. Dennee*, 3 Woods, 47. In *Westervelt's case*, *supra*, 203a, the defendants were charged in the first count with the misdemeanor of abduction, and in other counts with conspiracy to abduct. The defendants were convicted generally, and were sentenced by the Philadelphia court of oyer and terminer to seven years imprisonment, this being the statutory punishment for abduction, while the limit for conspiracy is two years. The supreme court refused a special allocatur to bring up the case for review.

In *Huntzinger v. Com.*, 10 Weekly Notes, 98, the indictment contained two counts. The first charged that the defendants, being respectively president and cashier of the Miners' Trust Co. Bank of Pottsville, "did falsely and maliciously combine, conspire, confederate, and agree together to cheat and defraud Thomas F. Kerns of a large sum of money, to wit, the sum of twenty-four thousand dollars, by means of falsely and fraudulently representing to the said Thomas F. Kerns that the Miners' Trust Company Bank of Pottsville was solvent and able to pay all its liabilities, and thereby inducing him to deposit in the said The Miners' Trust Company Bank of Pottsville, the said sum of twenty-four thousand dollars, whereas in truth and in fact the said Jacob Huntzinger, president, as aforesaid, and the said J. Albert Huntzinger, cashier, as aforesaid, well knew, at the time the representations, as aforesaid, were made, that the said corporation was wholly insolvent and unable to pay its liabilities, to the prejudice of the said Thomas F. Kerns, contrary to the form of the act," etc.

The second count charged that the defendants "did falsely and maliciously combine, conspire, confederate, and agree together to cheat and defraud Thomas F. Kerns of a large sum of money, to wit, the sum of twenty-four thousand dollars, to the great prejudice of the said Thomas F. Kerns, contrary to the form of the act," etc.

The court below having, after conviction, sentenced the defendants to make restitution, the judgment, in the latter respect, was reversed by the supreme court. In that court, however, an *allocatur* was refused to review the conviction in other respects. And in discussing the question of the rightfulness of the

sentence, the sufficiency of the indictment was not questioned. "The sole question," said Trunkey, J., "is whether the indictment supports a judgment of restitution. It is not now and here gainsaid that the judgment in all other respects was right. The offence of conspiracy was clearly and sharply set forth in each of the two counts in the indictment. Had Kerns not lost a dollar, on proof of the alleged conspiracy the defendants could have been as well convicted on the first as the second. In the first count only the means for accomplishment of their purpose are stated, namely, false and fraudulent representations to Kerns respecting the solvency of a corporate bank, thereby inducing him to deposit twenty-four thousand dollars in said bank. It is obvious that the commonwealth intended to state only the means intended to be used by the conspirators. Direct averment is not made that Kerns did deposit said money, or that he lost the money. Certainly it cannot be inferred from anything in the indictment that the defendants themselves took or obtained the money, for it is a mere inference from the means they devised by which it may be said that the corporation got the money. If the part charging conspiracy be struck out, no crime or misdemeanor is stated in the indictment."

An indictment for conspiracy to cheat and defraud a party of the fruits and advantages of a verdict obtained, is bad for generality. *R. v. Richardson*, 1 M. & Rob. 402. A conspiracy "to defraud the creditors of W. E." is too general. *R. v. Fowle*, 4 C. & P. 482. Where a count charged the defendants with conspiring to deceive and defraud divers of her majesty's subjects who should bargain with them for the sale of goods, of great quantities of such goods, without making payment or satisfaction for the same, with intent to obtain profit and emolument to defendants (not stating with particularity what the defendants conspired to do), it was held bad, as not showing that the conspiracy was for a purpose necessarily criminal. *R. v. Peck*, 9 A. & E. 686. A count charging that the defendants, being indebted to divers persons, conspired to defraud them of the payment of such debts, and in pursuance of such conspiracy executed a false and fraudulent deed of bargain and sale and assignment of certain goods from two of themselves to a third, with intent thereby to obtain emoluments to themselves, is bad, for omitting to show in what respect the deed was false and fraudulent. *R. v. Peck*, 9 A. & E. 686. An indictment stating merely that the defendants conspired "by false, artful, and deceitful stratagems and contrivances, as much as in them lay, to injure, oppress, aggrrieve, and impoverish" the prosecutor, is too general and indefinite. *R. v. Biers*, 3 N. & M. 475; 1 A. & E. 337, S. C. But in a leading case already discussed, an indictment charging that the defendants conspired "by divers false pretences and subtle means and devices, to obtain and to acquire to themselves, of and from P. D. and C. D., divers large sums of money of the respective moneys of the said P. D. and C. D., and to cheat and defraud them respectively thereof," was held sufficient, for the gist of the offence being the conspiracy, if that fact and its object be stated, the particular means and devices need not be set out. *R. v. Gill*, 2 B. & Al. 204. That this case is still authority in England has been already seen. A count for a conspiracy, which charged that T. and B. conspired to cause certain goods, which had been and were imported and brought into the port of London, from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to the queen, to be carried away from the port and delivered to the owners without payment of a great part of the duties, with intent thereby to defraud the queen, not further describing the goods, or the means of effecting the object of the conspiracy, was held sufficient on motion in arrest of judgment. *R. v. Blake*, 6 Q. B. R. 126. The third count, of an indictment to obtain money on false pretences, charged the offence in general terms as a conspiracy to cheat the prosecutor of his money, without setting out the false pretences. The evidence was that the prosecutor was told by the defendant that the horses in question had been the property of a lady deceased, and were then the property of her sister, and never had been the property of a horse-dealer, etc. All these statements were false, the defendants knowing that nothing but a belief of their truth

would have induced the prosecutor to make the purchase. The conspiracy was proved; it was held that this count was sufficient, and that it charged an indictable offence. *R. v. Kenrick*, 5 Q. B. 49; *Dav. & M.* 208, *Wh. Cr. L.* 8th ed. §§ 1348-9, 1371, 1386, 1391. The fourth and fifth counts of the same indictment charged the obtaining of money by false pretences; the evidence was that the defendant, in order to induce the prosecutor to make the contract of purchase, made the false pretence aforesaid respecting the horses sold, and thereby induced him to buy; and it was held that these counts were good, and that the liability to action did not of itself furnish any answer to the indictment. 1b. In Maryland, an indictment charging, first, an executed conspiracy, falsely, etc., by wrongful and indirect means to cheat, defraud, etc., the Bank of the United States; and secondly, charging a conspiracy only (as before), where one of the defendants was president of the office of discount, etc., of the bank, and another the cashier of the office, and another a director of the mother bank, was held to allege sufficiently in each count, a punishable conspiracy at common law. *State v. Buchanan*, 5 Har. & J. 317. The same liberal view of pleading was taken in Pennsylvania in *Collins v. Com.*, 3 S. & R. 220; already cited and noticed more fully, *infra*, 612. And the supreme court of Pennsylvania in 1822 sustained a count which averred that the defendants conspired "to cheat and defraud J. S. of the aforesaid heifer." "There may be confederacies," said Gibson, J., in giving the opinion of the court, "which are lawful, and you must therefore set forth some object of the confederates which it would be unlawful for them to attain either singly, or which, if lawful singly, it would be dangerous to the public to permit to be attained by the combination of individual means; for it is the object that imparts to the confederacy its character of guilt or innocence; and of the nature of each object, and the bearing which the various kinds of it may have on the question in different cases, it is at present necessary to say no more than that where it is the doing of an act which would be indictable, it would undoubtedly render the confederacy criminal. But in stating the object, it is unnecessary to state the means by which it is to be accomplished, or the acts that were to be done in pursuance of the original design; they may in fact not have been agreed on. You need not set forth more of the object than is necessary to show it, from its general nature, to be unlawful; for that is all that is necessary to determine the character of what is in truth, essentially and exclusively the crime, the confederating together; and this is proved by the precedents produced on the part of the commonwealth." *Com. v. McKisson*, 8 S. & R. 420. This case, however, must be regarded as modified by subsequent rulings already cited.

In an indictment for a combination to marry paupers, in order to throw the burden of maintaining them on another parish, it is necessary to show that some threat, promise, bribe, or other unlawful device was used, because the act of marriage being in itself lawful, the procuring it requires this explanation in order to be charged as a crime. *R. v. Fowler*, 1 East's P. C. 461, 462; *R. v. Seward*, 3 N. & M. 557; 1 A. & E. 706, S. C. In such case it is essential to show the intent of the combination, by stating that the husband was a pauper, and the wife legally settled in the parish from which she was taken. *R. v. Tanner*, 1 Esp. Rep. 306, 307; *R. v. Edwards*, 8 Mod. 320.

Where an indictment charged the defendants with conspiring to cause goods which had been imported, etc., and in respect of which certain duties of customs were payable to the queen, to be carried away from port without payment of duties, with intent to defraud the queen in her revenue of customs, and there were also counts charging the defendants generally, with conspiring to defraud the queen of duties, by false and fraudulent representations of the value and nature of the goods; it was held, that the gist of the indictment being the conspiracy, the indictment was sufficiently certain, without showing what the goods were, or what duties were payable on them. *R. v. Blake*, 6 Q. B. 126; 13 Law J. N. S., M. C. 131; *Wh. Cr. L.* 8th ed. §§ 1359, 1401.

(608) *Second count. Conspiracy with overt act.*

That the said defendants, being such persons as aforesaid, and devising and intending as aforesaid, afterwards, to wit, on, etc., at, etc., fraudulently, maliciously, and unlawfully, did conspire, combine, confederate, and agree together, between and amongst themselves, etc. (*as in first count, and proceed to state overt act, as follows*): And the inquest, etc., on their oath aforesaid, do further present, that the said defendants, together with the said evil disposed persons, in execution of the said last mentioned premises, and in pursuance of the said conspiracy, combination, and agreement, between and amongst them as aforesaid, afterwards, to wit, on, etc., at, etc., did(*h*) (*setting forth overt act*), against, etc. (*Conclude as in book 1, chapter 3.*)

(*g*) It is essential to set forth the names of the parties to be injured when practicable, or to give a good reason for their non-specification. Thus in *R. v. King* (7 A. & E. 806), Tindal, C. J., said: "The second and more important objection was, that the indictment itself was bad; and we are all, upon consideration, of opinion that this objection must prevail. Mr. Pashley, for the plaintiffs in error, argued that the indictment was bad because it contained a defective statement of the charge of conspiracy; and we agree that it is defective. The charge is, that the defendants below conspired to cheat and defraud *divers* liege subjects, being tradesmen, of their goods, etc.; and the objection is that these persons should have been designated by their Christian and surnames, or an excuse given, such as that their names are to the jurors unknown; because this allegation imports that the intention of the conspirators was to cheat certain indefinite individuals, who must always be described by a name, or a reason given why they are not; and, if the conspiracy was to cheat indefinite individuals, as for instance those whom they should afterwards deal with or afterwards fix upon, it ought to have been described in appropriate terms, showing that the objects of the conspiracy were, at the time of making it, unascertained, as was in fact done in the case of *R. v. De Berenger* (3 M. & S. 67), and *The Queen v. Peck* (9 A. & E. 686); and it was argued that, if, on the trial of this indictment, it had appeared that the intention was not to cheat certain definite individuals, but such as the conspirators should afterwards trade with or select, they would have been entitled to an acquittal; and we all agree in this view of the case, and think that the reasons assigned against the validity of this part of the indictment are correct." But the specification need not be exhaustive. It will be sufficient if one of the parties to be injured be specified, *supra*, note *c*, p. 104, and names need not be given when the object was to injure the public as a body. See fully under this head *Wh. Cr. L.* 8th ed. § 1396.

(*h*) It is usual to set out the overt acts, that is to say, those acts which may have been done by any one or more of the conspirators, in pursuance of the conspiracy, and in order to effect the common purpose of it; but this is not requisite if the indictment charge what is in itself an unlawful conspiracy. *R. v. Seward*, 1 A. & E. 706; 3 N. & M. 557, S. C.; and see *R. v. Gill*, 2 B. & Al. 204; 1 East P. C. 461. The offence is complete on the formation of the conspiracy, and the overt acts, when set forth, may be either regarded as matters of aggravation, or discharged as surplusage. *R. v. Seward*, 1 A. & E. 706; 3 N. & M. 557; *R. v. Heymann*, L. R. Q. B. 102; 12 Cox C. C. 388; *O'Connell v. R.*, 11 Cl. &

(609) *Conspiracy to rob.*

That defendants, being persons of evil minds and dispositions (with divers others, etc), on, etc., at, etc., unlawfully and wickedly did conspire, combine, confederate, and agree together, in and upon one A. B., in the peace of God and of the commonwealth then and there being, feloniously to make an assault, and

Fin. 15; Com. v. Eastman, 1 Cush. 190; Com. v. Shedd, 7 Cush. 514; Collins v. Com., 3 S. & R. 220; State v. Buchanan, 5 H. & J. 317; State v. Cawood, 2 Stew. 360. See Wh. Cr. L. 8th ed. § 1382, where other authorities are given. As we have seen, it has been argued that when a conspiracy to commit a crime has ripened into the commission of the crime, the conspiracy is merged in the crime, *supra*, note *f*, p. 105 *et seq.* The prevalent opinion, however, is that a conspiracy is a distinct offence, which may be prosecuted cumulatively with the offence which the conspiracy was intended to consummate, or which may be made the object of an alternative prosecution. Wh. Cr. L. 8th ed. § 1382; *supra*, p. 105.

How far the overt acts can be taken in to aid the charging part was considered by Tindal, C. J., in the exchequer chamber, in *King v. R.*, 7 A. & E. 807.

"But it was then urged by the learned counsel for the crown that, supposing these objections to be well founded, this defect in the allegation of the conspiracy was cured by referring to the whole of the indictment the part stating the overt acts, as well as that stating the conspiracy; and *R. v. Spragge* (2 Burr. 999) was cited as an authority, that the whole ought to be read together. The point decided in that case appears to have been merely this, that, in an indictment for a conspiracy, though the conspiracy be insufficiently charged, yet, if the rest of the indictment contains a good charge of a misdemeanor, the indictment is good. Lord Mansfield distinguishes between the allegation of the unexecuted conspiracy to prefer an indictment, as to the sufficiency of which he gave no opinion, and that of the actual preferring of the indictment maliciously and without probable cause, which he calls a complete conspiracy actually carried into execution; and this he holds to be clearly sufficient; and no doubt it was so; for, rejecting the averment of the unexecuted conspiracy, the indictment undoubtedly contained a complete description of a common law misdemeanor. *King v. R.*, 7 A. & E. 806, 808:

"But if we examine the allegations in this indictment, there is no sufficient description of any act, done after the conspiracy, which amounts to a misdemeanor at common law. None of the overt acts are shown by proper averments to be indictable. The obtaining goods, for instance, from certain named individuals upon credit, without any averment of the use of false tokens, is not an indictable misdemeanor; and, if it is said that because it is averred to have been done in pursuance of the conspiracy before mentioned, it must be taken to be equivalent to an averment that the conspiracy was to cheat the named individuals of their goods, the answer is, first, that it does not necessarily follow, because the goods were obtained in pursuance of the conspiracy to cheat some persons, that the conspiracy was to cheat the persons from whom the goods were obtained; they might have been obtained from A., in the execution of an ulterior purpose to cheat B. of his goods. And, secondly, another answer is, that, if the averment is to be taken to be equivalent to one, that the goods were obtained from the named individuals in pursuance of an illegal conspiracy to cheat and defraud those named individuals of their goods, it would still be defective as not containing a *direct and positive* averment that he did conspire to cheat and defraud those persons, which an indictment for a conspiracy, where the conspiracy itself is the crime, ought certainly to contain. The averment describing the offence ought to be direct and positive." See Wh. Cr. L. 8th ed. §§ 1381 *et seq.*

him the said A. B. in bodily fear and danger of his life then and there feloniously to put, and the goods and chattels, moneys, and property of the said A. B., from the person and against the will of the said A. B., then and there feloniously and violently to steal, take, and carry away, to the evil example, etc.

(610) *Conspiracy to murder, with an attempt to induce a third party to take part in the same.*(i)

That H. D., late of, etc., and J. S., late of, etc., not having the fear of God before their eyes, but being moved and seduced by the instigations of the devil, on, etc., at, etc., did intend, combine, conspire, and agree together a certain F. M., in the peace of God and this commonwealth then and there being, feloniously to kill and murder; and the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said H. D. and J. S., in the prosecution of such their wicked and diabolical intention and agreement, at the day and year aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, did labor and instigate, solicit, entice, and endeavor to persuade a certain T. O. to aid, assist, and abet them the said H. and J. in accomplishing and fulfilling their said wicked intentions, and in the felony and murder by them intended to be committed. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said H. D., on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, in the further prosecution of such his wicked intentions aforesaid, did offer and promise to give unto the said T. O. a new suit of wearing apparel and six hundred dollars, if he the said T. would admit him the said H., secretly and in the night-time, into the dwelling-house of the said F. M., that he the said H. might then and there feloniously kill and murder the said F. M., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(610a) *Conspiracy to kill female child.*

The jurors for, etc., upon their oath present, that E. B. and L. B., on, etc., unlawfully and wickedly did conspire, confede-

(i) From Mr. Bradford's Precedents.

rate, and agree together, a certain infant female child of tender age, to wit, of the age of two days, the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of their malice aforethought to kill and murder, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on, etc., the said E. B. was delivered of a female child, the name whereof is to the jurors aforesaid unknown, which said child was then and still is living; and that the said E. B. and the said L. B. did unlawfully and wickedly conspire, confederate, and agree together the said child feloniously, wilfully, and of their malice aforethought to kill and murder, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year last aforesaid, the said E. B. was delivered of a female child, which said child then was and still is alive, and the name whereof is to the jurors aforesaid unknown; and that before the said child was born, and whilst she said E. B. carried and was quick with the said child of which she was so delivered as aforesaid, to wit, on, etc., the said E. B. and the said L. B., being evil disposed persons, and wickedly devising and intending, if and in case the said child was born alive, the life of the said child to take and destroy, unlawfully and wickedly did conspire, confederate, and agree together the said child, if born alive, feloniously, wilfully, and of their malice aforethought, to kill and murder. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on, etc., in the year aforesaid, and in pursuance of and according to the same conspiracy, confederation, and agreement, the said L. B. did write and post at a certain post office a letter to the said E. B., with intent the same should be delivered to and read by the said E. B., and in and by the said letter did incite, encourage, and propose to the said E. B. the life of the said child to take and destroy. And the jurors afore-

said, upon their oath aforesaid, do further present, that after and in pursuance of, and according to the said conspiracy, confederacy, and agreement, to wit, on, etc., the said E. B. did write a letter to the said L. B., and did deliver the said letter to one J. M., with intent the said J. M. should post the same, and that the same should be delivered to and read by the said L. B., and in and by the said letter did solicit and propose to the said L. B. to aid and assist her the said E. B. the life of the said child to take and destroy, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on, etc., the said L. B. unlawfully and wickedly did solicit, encourage, persuade, and endeavor to persuade the said E. B. a certain female child then lately before born of the body of the said E. B., the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year last aforesaid, the said L. B. unlawfully and wickedly did propose to the said E. B. a certain female child, then lately before born of the body of the said E. B., and the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year last aforesaid, the said E. B. was delivered of a certain female child, which said child was then and still is living, the name whereof is to the jurors aforesaid unknown; and that before the birth of the said child, and whilst the said E. B. carried and was quick with the said child, to wit, on, etc., the said L. B. falsely, wickedly, and unlawfully did solicit and incite the said E. B. the said child, when born,

by means of a certain poison, to wit, salts of lemon, feloniously, wilfully, and of her malice aforethought, to kill and murder, to the evil example of all others in like case offending, etc.

Seventh count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on, etc., the said E. B. was delivered of a female child, then and still alive, the name whereof is to the jurors aforesaid unknown; and being so delivered of the said child as aforesaid, afterwards, to wit, on, etc., unlawfully and wickedly did solicit, encourage, persuade, and endeavor to persuade the said L. B. the said child feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Eighth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on the day and year last aforesaid, the said E. B. unlawfully and wickedly did propose to the said L. B. a certain female child then recently born of the body of the said E. B., the name whereof is to the jurors aforesaid unknown, feloniously, wilfully, and of her malice aforethought to kill and murder, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Ninth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that on, etc., the said E. B. was delivered of a female child, then and now living, the name whereof is to the jurors aforesaid unknown; and afterwards, to wit, on, etc., falsely, wickedly, and unlawfully did solicit and incite the said L. B. her the said E. B. to aid and abet in taking and destroying the life of the said child by drowning, and so the said child feloniously, wickedly, and of her malice aforethought to kill and murder, to the evil example of all others in the like case offending, etc.(j)

(611) *Conspiring to cheat prosecutor by divers false pretences and subtle means. First count.(k)*

That T. K. the elder, late of, etc., horse-dealer, and T. K. the younger, late of, etc., horse-dealer, being evil disposed persons,

(k) *R. v. Kenrick*, 5 A. & E. N. S. 49, discussed in Wh. Cr. L. 8th ed. §§ 1161, 1180, 1198, 1347, 1348, 1349, 1371, 1386, 1388, 1391. This count, which is substantially the same with that of *R. v. Gill* (2 B. & Al. 204), is fully discussed in the note at the beginning of this chapter. In the present case, Lord Denman said: "This was an indictment for a conspiracy, containing five counts. Of these the two last were given up by the counsel for the prosecution, on account of an objection wholly unconnected with that made to the others now to be considered. The third ran in the following form. (His lordship then read the third count.) The fourth and fifth charged the defendants with obtaining money by false pretences, which were set forth.

"It was contended, in the first place, that the third count was bad by reason of uncertainty, as giving no notice of the offence charged. The whole law of conspiracy, as it has been administered at least for the last hundred years, has been thus called in question; for we have sufficient proof that during that period any combination to prejudice another unlawfully, has been considered as constituting the offence so called. The offence has been held to consist in the conspiracy, and not in the facts committed for carrying it into effect; and the charge has been held to be sufficiently made in general terms describing an unlawful conspiracy to effect a bad purpose.

"This form of indictment was formally questioned in *R. v. Gill* (2 B. & Al. 204), and was, upon discussion, held good; nor has that decision been overruled. The indictment in *R. v. Eccles*, stated in a note there, is equally general.

"There have not been wanting occasions when learned judges have expressed regret that a charge so little calculated to inform a defendant of the facts intended to be proved upon him, should be considered by the law as well laid. All who have watched the proceedings of courts are aware that there is danger of injustice from calling for a defence against so vague an accusation; and judges of high authority have been desirous of restraining its generality within some reasonable bounds. The ancient form, however, has kept its place, and the expedient now employed in practice of furnishing defendants with a particular of the facts charged upon them, is probably effectual for preventing surprise and unfair advantages. Doubts have also been expressed how far an indictment for conspiracy may be maintained where the object of it was of a very trivial nature, or where the whole matter might be thought to sound in damage, not in crime. Lord Ellenborough, in *R. v. Turner* (13 East, 228), would not permit parties to be convicted of a conspiracy for effecting so slight an object as a trespass by following the game on another's land. The same learned judge, in *R. v. Pywell* (1 Stark. N. P. C. 402), stopped the case on the trial of an indictment for a conspiracy, where the fraud to be accomplished appeared to be such as would more properly be the foundation of a civil action on the warranty of a horse. But if, in the case of *R. v. Turner* (13 East, 228), the meditated injury, instead of ending with a trespass, had been planned for the purpose of seizing the land owner, or driving him from the country, we have no reason to think that the learned judge would have condemned an indictment for a conspiracy to effect that object. In the case of *R. v. Pywell* (1 Stark. N. P. C. 402), the acquittal was directed, not because an action might have been brought on a warranty, but because one of the two defendants, though acting in the sale, was not shown to have been aware that a fraud was practised. His lordship said, 'that no indictment in a case like this could be maintained without evidence of concert between

and seeking to get their living by various subtle, fraudulent, and dishonest practices, on, etc., with force and arms, at, etc., together with divers other evil disposed persons, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves, of and from one G. W. F., divers large sums of money, of the moneys of the said G. W. F., and to cheat and defraud him thereof, to the great damage of the said G. W. F., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

Like the first, except that the conspiracy, etc., was alleged to be "to obtain and acquire to the said T. K. the elder" (only), of and from the said G. W. F., etc.

Third count.

(Like the second, only substituting): "T. K. the younger," for "T. K. the elder."

(611a) *Conspiracy to cheat by fraudulent devices and contrivances and divers false pretences.*(l)

That A. B. and C. D., on, etc., at, etc., unlawfully and fraudulently, did combine confederate, and conspire together with

the parties to effectuate a fraud.' Lord Tenterden also is supposed to have thrown some doubt on the common form of indictment for conspiracy in *R. v. Fowle* (4 C. & P. 592); but the indictment there departed from the common form, charging a conspiracy 'to cheat and defraud the just and lawful creditors' of F., but not saying, 'of their moneys,' or of anything. This objection could not have escaped that learned judge, though two others only, and those less weighty, are ascribed to him by the reporter; that it does not state what was to be done, or who was to be defrauded. Even that indictment, however, he permitted to be tried; and the defendants were acquitted for want of evidence. If they had been convicted, and the judgment arrested, the case of *R. v. Gill* (2 B. & Al. 204) would have remained untouched. Nor does Lord Tenterden say anything which indicates his dissatisfaction with it. The indictments in *R. v. Richardson* (1 M. & Rob. 402), and *R. v. Peck* (9 A. & E. 686), which were held bad, were satisfactorily distinguished in the argument, from that in *R. v. Gill*, 2 B. & Al. 204."

(l) This count was sustained in *R. v. Hudson*, 8 Cox, C. C. 305, by the court of criminal appeal. See Wh. Cr. L. 8th ed. §§ 1349, 1371, 1390. Pollock, C. B., said: "We are all of opinion that the conviction on the third count" (that given above) "is good, and ought to be supported. The count is in the usual form, and it is not necessary that the words 'false pretences' stated in it should be understood in the technical sense contended for by Mr. Price."

divers other persons to the jurors, etc., unknown, by divers unlawful and fraudulent devices and contrivances, and by divers false pretences, unlawfully to obtain from E. F. the sum of £2 10s. of the money of the said E. F., etc., and unlawfully to cheat and defraud the said E. F., etc., of the same. (*Conclude as in book 1, chapter 3.*)

(612) *Conspiracy to defraud by means of false pretences and false writings in the form and similitude of bank notes; the overt act being the uttering a note purporting to be a promissory note, etc., and to have been signed, etc.*(m)

That T. C. and A. B., etc., on, etc., at, etc., falsely, unlawfully, and wickedly did conspire, combine, confederate, and agree

And Channell, B., said, "If the count had said merely to conspire, and had omitted the words 'by false pretences,' it would have been good." In the argument, Mr. Price, for the defendants, argued that to sustain this count, "the evidence should have shown such a false pretence as *per se* would constitute the ordinary misdemeanor of false pretences;" but this was negated by the court in the words above given.

(m) *Collins v. Com.*, 3 S. & R. 220. See Wh. Cr. L. 8th ed. §§ 1348, 1382, 1400, 1405.

Tilghman, C. J.: "It is said, that it is no offence to conspire to defraud people by notes purporting to *have been* promissory notes, and to *have been signed*, etc.; because nobody could be imposed on, unless the note purported to be a promissory note at the time of passing it. This is a nice distinction. It would have been more proper to have said, purporting to be a promissory note, etc.; but, as to the expressions, to *have been signed*, etc., they are strictly proper, because the act of signing was previous to the act of passing, and therefore, when passed, the notes did in truth purport to *have been signed*. But there are other expressions charging an unlawful conspiracy; the plan is described as an agreement, confederacy, etc., to defraud, by means of false pretences and false writings in the *form and similitude of bank notes*, etc., so that upon the whole it sufficiently appears, that there was an unlawful conspiracy. Besides, the overt act is charged with strict propriety; the note uttered and paid to Preston is described as purporting to be a *promissory note*, etc., and to *have been signed*, etc. But it is objected, that the passing of this note was the act of Collins alone, for which the other defendants are not answerable. It would have been so, had it not been done in pursuance of the project in which they were all engaged; but it is laid in the indictment as having been done, 'according to and in pursuance of the conspiracy, combination, confederacy, and agreement among themselves had, as aforesaid,' etc. The act of one, therefore, is to be considered as the act of all. It is also objected, that it does not appear that Preston was defrauded of any money, or other property. That is of no importance; the note was paid to him *for the purpose of defrauding him*, which makes the offence complete, whether he was actually defrauded or not."

Gibson, J.: "In this indictment the fact of confederating is the gist of the offence. The overt acts charged to have been done in pursuance of the conspiracy are only matters of aggravation, and not necessary to the consummation of the crime; which would be well laid if all the overt acts were omitted. If this were an indictment for cheating, instead of conspiring to cheat, the argument in

among themselves to deceive and defraud, and to cause to be deceived and defrauded, divers of the citizens of the common-

behalf of the defendant below might possibly have weight ; but I am not aware that in a case like the present, it is at all necessary to set out the false tokens or pretences with which the cheat was intended to be effected. A confederacy to cheat, generally, would be indictable before any means should be devised to carry the unlawful purpose into execution. *Regina v. Best*, 2 Ld. Raym. 1167. And where the act is *unlawful*, there is no occasion to state the means by which it is to be effected ; but where it only becomes illegal from the means employed to execute it, so much must be stated as will show its illegality. In the Crown Circuit Companion, there is a precedent of an indictment against the curate and officers of a parish, for a conspiracy to cheat sufferers by fire out of money collected by a brief for their use ; in which the fraudulent intent is stated generally, without specifying any preconceived means of carrying it into effect. And in 3 Chitty's Criminal Law, 615, there is a count for a general conspiracy to defraud, without stating any overt act. But if it were necessary to set forth the nature of the false pretences, this indictment contains a sufficient description of them, even if the part objected to were struck out. To say that the defendant defrauded 'divers of the citizens of Pennsylvania of great sums of money, by means of false pretences, and false, illegal, and unauthorized paper writings in the form and similitude of bank notes, which paper writings were of no value,' would be a sufficient description of the false pretences, in an indictment for cheating. But it is objected, that these writings are further described as purporting to *have been* promissory notes for the payment of money, and to *have been* signed, etc., without any averment that they were so at the time the confederacy was formed ; and, consequently, that it does not appear that those writings, unaided by false representation, could be effectual instruments in the execution of the fraudulent design, which, if effected by a naked lie, would not be indictable as a cheat. But that conclusion does not follow. A counterfeit bank note, although without a signature, and although it should not strictly purport to be a promissory note for the payment of money, may, very readily, be the successful means of perpetrating a fraud on the unwary, who are as much under the protection of the law as the most acute. In *Grover's case* (Sayer Rep. 206), the defendant was indicted for cheating, by assuming the character of a merchant, and producing 'to I. S. several paper writings, which he falsely affirmed to be letters from Spain, containing commissions for jewels, etc., to the amount of £4000, by means whereof he got into his hands two watches, the property of I. S.,' without any distinct averment that the paper writings *purported* to be such ; and it was held good. But taking it that the law would be otherwise if this were an indictment for cheating, would a conspiracy be less criminal in legal estimation, because the means agreed on to carry the unlawful design into execution were not like to prove effectual ? It is no excuse for a conspiracy to carry on a malicious prosecution, that the indictment was defective, or that the court before whom it was found had no jurisdiction ; although, in either case, the defendant never was in jeopardy. Hawk. b. 1, c. 72, s. 3. The devising of means is not a constituent part of the offence, but an act done in pursuance of the original design. This remark also applies to the remaining objections, which relate to the manner of setting forth a variety of instances of fraud, *actually perpetrated* by means of the simulated paper writings before described ; and not to the original hatching of the plot. On the second point I concur with the rest of the court ; the law has been frequently settled as stated."

Duncan, J. : "It is objected, that the fact as charged is not indictable ; that the sentence is erroneous. The objection is, that the indictment states that the notes purported to have been signed and to have borne date at different days, in the past tense ; and though they might have purported to be so, that it did not

wealth of Pennsylvania, of great sums of money, by means of false pretences, and false, illegal, and unauthorized paper writings in the form and similitude of bank notes, which said paper writings were of no value, and purported to have been promissory notes, bearing different dates, for the payment of divers sums on demand, by the Ohio Exporting and Importing Company, at their bank in Cincinnati, and to have been signed by Z. S. as president, and J. L. as cashier, when, in verity and in truth, no such banking company existed; and that, according to and in pursuance of the conspiracy, combination, confederacy, and agreement among themselves had as aforesaid, the said T. C. afterwards did fraudulently, unlawfully, and deceitfully offer and pay to one J. P., for the purpose of deceiving and defrauding him, the said J., for and as a good, genuine, and lawful bank note, one of the aforesaid false, illegal, and unauthorized paper writings in the form and similitude of a bank note, partly written and partly printed, purporting to be a promissory note for the payment of ten dollars by the Ohio Exporting and Importing Company, to N. W., or bearer, on demand, at their bank in Cincinnati, bearing date the fifteenth day of January, in the year of our Lord one thousand eight hundred and sixteen, and to have been signed by Z. S. as president, and J. L. as cashier; he, the said T. C., then and there, to wit, on, etc., well knowing that no such bank existed, at Cincinnati or elsewhere, as the Ohio Exporting and Importing Company, and that the said

necessarily follow that they were so when they were uttered and passed. The conspiracy was to 'cheat and defraud, by certain papers purporting to have been signed by certain persons, and at certain times; and that Collins, in pursuance of this conspiracy, did utter and pay these papers, purporting to have been so signed and so to bear date;' this appears to me a sufficient and satisfactory setting forth of these papers. It was not necessary to set them forth verbatim; it was only necessary to state what they purported to be. The allegation is, that they purported to be what they were not. That is the substance of the offence, and it is substantially charged. It is again objected, that the act done by Collins is not the act which the defendants are alleged to have conspired to do. Now the conspiracy was to deceive and defraud divers citizens of this commonwealth by means of these papers, and the charge is, that Collins did, in pursuance of such conspiracy, etc., utter and pay; the overt act laid was the act they combined to do. It was not a conspiracy to commit one act of fraud on an individual, but on all on whom they could practise this imposition. It is further objected, that no actual fraud is alleged to have been perpetrated. The act of fraud was his uttering and paying these notes; they were uttered and paid as good and genuine notes of a certain bank, the defendant well knowing there was no such bank."

note, purporting to be a bank note issued by the said company, was of no value, etc.

(613) *Conspiracy to cheat prosecutor by inducing him to buy a bad note.*

That B., late of and W., late of etc., being persons of wicked and fraudulent minds and dispositions, and wickedly devising and intending to cheat and defraud the said O. D. of his money, goods, chattels, and property, on at G., in the county of W. aforesaid, unlawfully, wickedly, and deceitfully did conspire, combine, confederate, and agree together to cheat and defraud the said O. D. of his money, goods, chattels, and property as aforesaid, under a false and deceitful color and pretence of said B.'s securing to be paid unto the said O. D. three hundred and forty-one dollars and thirty cents, by indorsing and transferring to the said O. D. a certain promissory note made by one M. G., by which note the said M. G. promised to pay B., or order, three hundred and forty-one dollars and thirty cents on demand; and the jurors, etc., do further present, that the said B., in pursuance of and according to the said conspiracy, did on (at in the county of aforesaid), wickedly and fraudulently pretend to the said O. D. that the said M. G. was solvent and able to pay the said note, and that the said O. D. would be in no danger of losing the sum of money contained in said note by taking the assignment thereof, at the risk of the said O. D. collecting the contents from the said M. G., without resorting to the said B. as indorser, and that the said W., in further pursuance of, and according to the conspiracy aforesaid, afterwards, to wit, on at aforesaid, falsely and deceitfully represented to the said O. D. that he, the said W., was the said M. G., the maker of the said note, and that the said W. had then two hundred dollars in money for the purpose of paying in part the contents of said note, and that in case the said O. D. would purchase the said note of the said B., he, the said W., would thereupon immediately pay the sum of two hundred dollars to the said O. D. in part payment of the said note, and would pay the remainder in a short time thereafter. And the jurors aforesaid, upon their oath, etc., do further present, that the said B., in further pursuance of, etc., the said conspir-

acy, assigned and transferred said note, etc., by force of the said false pretences hereinbefore mentioned, and that he, the said B., in further pursuance of, and according to said conspiracy, by means of said false pretences, and by force of said assignment and transfer of said note, did wickedly and fraudulently obtain from the said O. D. one horse, of the value of thirty dollars, a wagon, of the value of thirty dollars, etc., of the goods and chattels of the said O. D.; whereas, in truth and in fact, the said M. G. was then and there insolvent, and not able to pay the money contained in the said note, which they the said B. and W. then and there well knew; and whereas, in truth and fact, the said W. was not the maker of the said note, nor liable to pay the same, as was falsely pretended by the said W. to the said O. D., as they the said B. and W. then and there well knew; to the great injury and damage of the said O. D., and against, etc. (Conclude as in book 1, chapter 3.)(n)

(614) *To cheat by indirect means, etc., with overt acts charging false pretences, etc.*(o)

That H. G., C. L., W. W., R. W., and F. W., etc., being wicked and evil disposed persons as aforesaid, and devising and

(n) *People v. Barrett*, 1 Johns. R. 66. On this indictment, in consequence of the suddenly discovered absence of material testimony, the court, on application of the district attorney, withdrew a juror against the defendants' consent. On a subsequent day they were tried and convicted on the same indictment, but on error to the supreme court the judgment below was reversed, and they were discharged. Being afterwards reindicted in a new bill, they answered *autrefois acquit*, to which the attorney-general replied *nil tiel record*. However irregular this plea was under the circumstances—the proper course now being, in such case, to demur to the plea—the validity of the present indictment was brought before the court. The prosecution rested on the alleged inadequacy of the first indictment to sustain a verdict. After a zealous scrutiny, however, but one error was proved; but as that was enough to vitiate the indictment, it was held that it could not be pleaded in bar to further proceedings for the same offence. "The defendants' counsel," said Spencer, J., "has obviated all the exceptions taken to the indictment but one. There appears to be no *venue*, either expressly or by implication, as to the fraudulent representations made by B. to O. D., that M. G., the maker of the note, was in solvent circumstances. This representation is the very gist of the indictment; and had the defendants been convicted on it, I should have held the judgment liable to be arrested; for it is a fundamental principle in criminal law, that every material fact must be clearly and fully set out, so that nothing can be taken by intendment." This blank is here filled up by the averment in brackets.

(o) This indictment was sanctioned by the court of king's bench, in *R. v. Gompertz*, December 17, 1846, 11 Jurist, 204, 9 Q. B. 823 (see *supra*, 608, note; Wh. Cr. L. 8th ed. §§ 1348, 1381). The stress of the case was on the eighth count, which, as well as the other counts, was sustained by the court.

contriving, etc., on, etc., with force and arms, at, etc., unlawfully, falsely, fraudulently, and deceitfully did conspire, combine, confederate, and agree together unlawfully and by indirect means to obtain, acquire, and get into their hands and possession, of and from one G. P. R., certain bills of exchange accepted by the said G. P. R., amounting together to a large sum of money, to wit, the sum of seven hundred pounds, and to cheat and defraud the said G. P. R. of the proceeds of the said last mentioned bills of exchange so accepted as aforesaid; that in pursuance of the said last mentioned conspiracy, combination, confederacy, and agreement so as aforesaid had and made, the said H. G., C. L., W. W., R. W., and F. W., well knowing that the said G. P. R. was desirous of borrowing a certain sum of money upon certain security possessed by the said G. P. R., to wit, on, etc., at, etc., did falsely pretend, assert, and affirm to the said G. P. R., that one W. P., of Paris, in the kingdom of France, and then resident at H. hotel, Piccadilly, in the said county of Middlesex, a friend of the said H. G., and a client of the said W. W., R. W., and F. W., had agreed to lend and advance to the said G. P. R. and H. G. the sum of fifty-five thousand pounds, forty-two thousand five hundred pounds, part thereof, to be received by the said G. P. R., and the sum of twelve thousand five hundred pounds, the remainder thereof, to be received by the said H. G.; and that the said sum of fifty-five thousand pounds was lying waiting for them the said G. P. R. and H. G., at Messrs. H.'s, the bankers of the said W. P.; and that if the said G. P. R. would accept bills of exchange to the amount of five thousand pounds, in addition to a certain other bill of exchange before then accepted by the said G. P. R. for the sum of one thousand pounds, and would also accept a certain other bill of exchange for two thousand pounds, they the said W. W., R. W., and F. W., should and would retain for the said G. P. R. the sum of six thousand pounds out of the said H. G.'s share of the said loan or sum of fifty-five thousand pounds, and should and would also pay and discharge certain claims upon the said G. P. R., amounting to the further sum of two thousand pounds, out of the said G. P. R.'s share of the said loan or sum of fifty-five thousand pounds; by means of which said false pretences in this count mentioned, and in further pursuance of the said last mentioned conspiracy,

combination, confederacy, and agreement, so had and made as aforesaid, they the said H. G., C. L., W. W., R. W., and F. W., afterwards, to wit, on, etc., at, etc., did obtain, acquire, and get into their hands and possession, of and from the said G. P. R., certain other bills of exchange accepted by him the said G. P. R., and payable at a future day, for divers other large sums of money, amounting in the whole to a large sum of money, to wit, the sum of seven thousand pounds; that is to say, four bills of exchange for the respective sums of one thousand pounds each, two bills of exchange for the respective sums of five hundred pounds each, and one other bill of exchange for the sum of two thousand pounds. Whereas, in truth and in fact, the said W. P., of Paris, in the kingdom of France, and then resident at H. hotel, Piccadilly, in the said county of Middlesex, a friend of the said H. G., and a client of the said W. W., R. W., and F. W., had not agreed to lend and advance the said G. P. R. and H. G. the sum of fifty-five thousand pounds, the sum of forty-two thousand five hundred pounds, part thereof, to be received by the said G. P. R., and the sum of twelve thousand five hundred pounds, the remainder thereof, to be received by the said H. G. And whereas, in truth and in fact, no sum of fifty-five thousand pounds was lying waiting for them, the said G. P. R. and H. G., at Messrs. H.'s, the bankers of the said W. P.; and whereas, in truth and in fact, if the said G. P. R. would accept bills of exchange to the amount of five thousand pounds, in addition to a certain other bill of exchange before then accepted by the said G. P. R., for the sum of one thousand pounds, and would also accept a certain other bill of exchange for two thousand pounds, they the said W. W., R. W., and F. W. would not retain for the said G. P. R. the sum of six thousand pounds out of the said H. G.'s share of the said loan or sum of fifty-five thousand pounds, and would not also pay and discharge certain claims upon the said G. P. R., amounting to the sum of two thousand pounds, out of the said G. P. R.'s share of the said loan or sum of fifty-five thousand pounds; and whereas, in truth and in fact, there was no such person as W. P., of Paris, in the kingdom of France, and then resident at H. hotel, Piccadilly, in the said county of Middlesex, a friend of the said

H. G., and a client of the said W. W., R. W., and F. W.; and whereas, in truth and in fact, the said H. G., C. L., W. W., R. W., and F. W. well knew that no advance of money was intended to be made to the said G. P. R. by W. P., or any other person whatsoever; and, on the contrary thereof, the said H. G., C. L., W. W., R. W., and F. W., during all the time last aforesaid, intended only to obtain and acquire to themselves the said several last mentioned bills of exchange so accepted as aforesaid, and to convert the same to their own use, and utterly to cheat and defraud the said G. P. R. of the same, and of the proceeds thereof respectively, to wit, at, etc., to the great fraud, damage, and deception of the said G. P. R., etc.

The fourth count charged that the defendants conspired to enable the said H. G. to get into his hands certain bills of exchange accepted by the said G. P. R., and cheat and defraud him of the proceeds thereof; and proceeded to state certain overt acts.

The fifth count charged that the defendants conspired to cheat and defraud the said G. P. R. of divers large sums of money, of the proper moneys of the said G. P. R.; and proceeded to state overt acts.

The sixth count charged that the defendants conspired, by divers false pretences, to cheat and defraud the said G. P. R. of divers large sums of money, of the proper moneys of the said G. P. R.

The seventh count charged that the defendants conspired, by false pretences, to get into their hands divers other bills of exchange accepted by the said G. P. R., and payable at a future day; not stating overt acts.

The eighth count stated that the said H. G., C. L., W. W., R. W., and F. W., being such evil disposed persons as aforesaid, and devising and contriving as aforesaid, afterwards, to wit, on, etc., in the year aforesaid, with force and arms, at G.'s Inn aforesaid, in the county of Middlesex aforesaid, unlawfully, falsely, fraudulently, and deceitfully did conspire, combine, confederate, and agree together, by divers false pretences and indirect means, to cheat and defraud the said G. P. R. of his moneys, to the great damage, fraud, and deceit of the said G. P. R., to the evil example, etc.

(615) *Conspiracy to cheat by false pretences. First count. Conspiracy "by divers false pretences and subtle means and contrivances" to obtain goods, etc., from prosecutors. Overt acts charging a fraudulent carrying on business by a fictitious name, receiving goods on that basis, and fraudulently concealing the same.(p)*

That the several defendants, "intending to defraud divers of the liege subjects of our lord the king of their goods and mer-

(p) This is the first count of the indictment in *R. v. Hamilton*, 7 C. & P. 448.

The second charged that all the defendants, "intending to cheat and defraud divers of the liege subjects of our lord the king of their goods and merchandise," did conspire, "by divers false pretences and subtle means and contrivances, to obtain and acquire to themselves, of and from divers liege subjects of our lord the king, then carrying on business at or near Belfast aforesaid, to wit, J. B. and W. B. (naming the eight prosecutors), divers other goods and merchandise of great value, to wit, of the value of £10,000, and to cheat and defraud the said subjects of their said goods and merchandise, to the great damage of the said J. B. and W. B.," etc.

The third count was exactly similar to the second, except that it throughout omitted the names of the parties intended to be defrauded.

The fourth count was exactly similar to the third, except that in it the names of John Bell and William Bell were inserted throughout the count, instead of the words "divers liege subjects of our said lord the king, then carrying on business at or near Belfast aforesaid."

The fifth and sixth counts were similar to the fourth, except that in these counts the names of Mr. Stewart and Messrs. Bragg were substituted for those of Messrs. Bell.

The seventh count charged that all the defendants, "intending to cheat and defraud certain persons, then carrying on business at Belfast aforesaid, of their goods and merchandise," did conspire "that the said S. J., otherwise called G. F. H., should fraudulently get into his hands, under color and pretence of purchasing the same, divers goods and merchandises, of and belonging to certain merchants then carrying on business at Belfast, and that (all the defendants) should cheat and defraud the said merchants so carrying on business at Belfast, of the said goods and merchandise, to the great damage of the said merchants," etc.

The eighth count charged that the defendants, intending to defraud Messrs. Bell, did conspire that S. J., otherwise called G. F. H., should "fraudulently get into his hands, under color and pretence of purchasing the same," goods of Messrs. Bell, and that all the defendants "should cheat and defraud" Messrs. Bell of the same.

The ninth, tenth, and eleventh counts were similar, substituting the names of Mr. Stewart, Messrs. Bragg, and Mr. Makinson, for those of Messrs. Bell.

The twelfth count charged that all the defendants, "intending to cheat and defraud divers of the liege subjects of our lord the king of their goods and merchandises," did conspire, "by divers false pretences and subtle means and devices, that the said S. J., otherwise called G. F. H., should fraudulently get into his hands divers goods and merchandises of and belonging to the said liege subjects, and that (all the defendants) should cheat and defraud the said liege subjects of their said goods and merchandises, to the great damage of the said liege subjects," etc.

The thirteenth count charged that all the defendants, "intending to cheat and

chandise, on, etc., at, etc., and within the jurisdiction of the said court, unlawfully, etc., did conspire, with divers other persons

defraud divers liege subjects of our lord the king of their goods and merchandises," did conspire, "by false pretences and subtle means and devices, to get into their hands divers goods and merchandise, of and belonging to the said liege subjects, of great value, and to cheat and defraud the said liege subjects of the same, to the great damage of the said liege subjects," etc.

In this case a summons having been obtained, calling on the prosecutors to show cause why they should not deliver a particular of the charge :—

Bodkin, for the defendants, contended that, from the general nature of the indictment, the defendants could not make their defences without a particular of the charges.

C. Phillips, for the prosecution, submitted that, in a case of conspiracy, the defendants were not entitled to a particular of the charge.

Littledale, J., took time to consider, and then made the following order :—

"The King v. M. Woolf and others.

"Upon hearing Mr. Bodkin, of counsel for the defendants, and Mr. C. Phillips, of counsel for the prosecutors, and upon hearing the attorneys or agents on both sides, I do order that the prosecutors deliver to the defendant M. Woolf, or his attorney, a particular statement and specific charge, in writing, to be made against the said M. Woolf under this indictment, in order that he may be enabled fairly to defend himself against such charge ; and that in the mean time all further proceedings be stayed.

"Dated this 5th day of February, 1836.

J. LITTLEDALE."

Under this order the following particular was delivered :—

"In the central criminal court.—The King against Mozely Woolf and others.

"In obedience to an order obtained by you, we give you notice, that the statement or charge which is made against you is of conspiracy with Joseph Charles Lyons, Simeon Joseph, otherwise George Frederick Hamilton, Izidore Levinson, otherwise James Roller, Heyman Levin, Morris Levinson, and Abraham Hart-sane, or one of them, to defraud the several other persons mentioned in this indictment and others, by obtaining from them, through the said Simeon Joseph, otherwise George Frederick Hamilton, large quantities of goods under the false pretence that the said Simeon Joseph, otherwise called George Frederick Hamilton, was a partner in the firm of Malisius Schneider and Company, of Hamburg, and under the false and fraudulent pretences and means charged in the indictment, that you, the said Mozely Woolf, were a party or privy to the said conspiracy, and acted in furtherance thereof ; and that you received the said goods so fraudulently obtained, or part thereof, with a guilty knowledge, or with reasonable ground to suspect, that they had been fraudulently obtained, and that you did not come by honest and fair means, and in the usual course of fair and honest trade and dealing, into the possession of the said goods ; and take notice, that the prosecutors will contend that they are not bound or limited by this notice to giving in evidence any matter which, if this notice had not been delivered, they would have been entitled to give in evidence on the trial of this indictment. Dated this 9th day of February, 1836.

"Yours, etc.

ASHURST & GAINSFORD,

"Solicitors for the prosecution.

"To Mozely Woolf, one of the above named defendants, and to Mr. Isaacs, his attorney or agent, or whom else it may concern."

A summons was afterwards taken out before Mr. Justice Littledale, for a further and better particular of the charge.

Adolphus, for the prosecution.—I submit that there ought to be no particular in a case of conspiracy. I am aware that in cases of barratry and of embezzlement (*R. v. Hodgson*, 3 C. & P. 422 ; *R. v. Bootyman*, 3 C. & P. 300), par-

unknown, by divers false pretences and subtle means and contrivances, to obtain and acquire to themselves, of and from divers liege subjects of our lord the king, then carrying on business at or near Belfast, in that part of the United Kingdom called Ireland, to wit, of J. B., and of W. B., and of W. S., and of H. B. and H. B. the younger, and of G. H., and of T. H., and of C. A., divers goods and merchandises of great value, to wit, of the value of ten thousand pounds, and to cheat and defraud the said subjects thereof." And the jurors, etc., do further present, that the defendant S. J., otherwise called G. F. H., in pursuance of

particulars have been granted; and in a recent case of nuisance a particular was ordered (*R. v. Curwood*, 5 N. & M. 369); but in a case of conspiracy, I believe there is no instance of a particular of the charge having been ordered.

Littledale, J.—Before I made the order for a particular in this case, I conferred with several of the learned judges, and they agreed with me as to the making of the order. It is therefore not my opinion alone; I think you ought in your particular to state either that the goods were obtained by those pretences stated in the first count, or that you should specify what the pretences were.

Carrington, for the defendant Woolf.—Nothing can be more general than the particular already delivered. It does not limit the charge in any way either to time, place, persons, or facts. I submit, that Mr. Woolf should be informed what specific acts he is charged with having done, and also the times and places at which those acts are alleged to have taken place.

Littledale, J.—I do not think that, in a case of conspiracy, I ought to compel the prosecutors to state all that.

Carrington.—The prosecutors add a notice at the end of their particulars, vague as they are, that they do not intend to be bound by them, but that they meant to go into other evidence.

Littledale, J.—The prosecutors should not add that to their particulars. If, after giving particulars, the prosecutors give a distinct and separate notice that they mean to go into other evidence, and the defendants at the trial object to that, and rely upon the particulars, the judge at the trial will decide whether he will receive any evidence beyond the particulars. I think that the ordering of particulars in cases like the present, is a highly beneficial practice; and I also think that a particular should give the same information that a special count does. The first count in this indictment, in my opinion, states enough without any particular; the effect of a particular being, when a count is framed in a general form, to give the opposite party the same information that he would give if there was a special count. I have always understood this to be the rule with respect to particulars in civil cases.

He then made the following order:—

"The King *v. M. Woolf*, indicted with others.

"Upon hearing Mr. Carrington, of counsel for the defendant, and Mr. Adolphus, of counsel for the prosecution, and by consent, I do order, that the attorneys or agents for the prosecution deliver to Mr. Isaacs, the defendant, M. Woolf's attorney, a further and better particular of the nature and charge alleged in the indictment in this prosecution. And that, in the mean time, all further proceedings be stayed.

"Dated the 16th day of February, 1836.

"J. LITTEDALE."

See, as to bill of particulars, Wh. Cr. L. 8th ed. § 1386.

the said conspiracy, did afterwards, at Belfast, "falsely and fraudulently carry on business, under the style and firm of M. S. and Company, and did fraudulently obtain divers goods and merchandises of great value, to wit, of the value of ten thousand pounds, of and belonging to the said liege subjects of our said lord the king, then carrying on business at Belfast as aforesaid, under color and pretence of purchasing the same for the said firm of M. S. and Company, to wit, goods and merchandise of the said J. B. and W. B., of the value of one thousand pounds," and (*stating goods of the value of five hundred pounds of each of the other prosecutors*). And the jurors, etc., do further present, that the six other defendants, in further pursuance of this conspiracy, "did afterwards, to wit, on the day and year aforesaid, at London aforesaid, and within the jurisdiction of the said court, fraudulently receive the said goods so obtained by the said S. J., otherwise called G. F. H., as aforesaid, under color and pretence of having purchased the same, and did fraudulently conceal and secrete the same." And so the jurors aforesaid, upon their oaths aforesaid, do say, that (all the defendants), in manner and by the means aforesaid, unlawfully and fraudulently did obtain from the said J. B. and W. B., W. S., H. B. and H. B. the younger, G. H., T. H., and C. M., respectively, the goods and merchandise aforesaid, and did cheat and defraud them thereof, "to the great damage of the said J. B. and W. B., etc., and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(616) *Conspiracy to obtain from prosecutor certain articles under the pretence that defendants were the servants of a third party. Overt acts, charging the consummation of the conspiracy.*

That J. M'G. and P. M'G., late of, etc., yeomen, being evil and ill-disposed persons, and contriving and intending unlawfully, fraudulently, and deceitfully to cheat and defraud one C. G. P., of the city aforesaid, yeoman, on, etc., with force and arms, etc., at, etc., falsely, fraudulently, and unlawfully did combine, conspire, confederate, and agree together to obtain, acquire, and get into their possession, of and from the said C. G. P., three pots of kitchen fat, of the value of seven shillings and sixpence, and five bushels of wood ashes, of the value of

three shillings and ninepence, under the false color and pretence that the said J. and P. were the servants of K. and M., of the city aforesaid, tallow-chandlers and soap-boilers, and employed and authorized by them, the said K. and M., to collect kitchen fat and wood ashes for them, the said K. and M. And the said J. and M., in pursuance of, and according to the conspiracy, combination, and agreement aforesaid, so as aforesaid between them had, afterwards, to wit, on the same day and year aforesaid, at the city aforesaid, and within the jurisdiction of this court, falsely, fraudulently, unlawfully, and deceitfully did pretend and affirm that they, then and there, were the servants of K. and M., tallow-chandlers and soap-boilers, and that they were employed and authorized by them to collect kitchen fat and wood ashes. And the said J. and P., in pursuance of, and according to the conspiracy, combination, and agreement aforesaid, afterwards, to wit, on the same day and year aforesaid, at the city aforesaid, and within the jurisdiction of this court, by the false pretences aforesaid, did obtain, acquire, and get into their possession, unlawfully and fraudulently, three pots of kitchen fat, of the value of seven shillings and sixpence, and five bushels of wood ashes, of the value of three shillings and ninepence, of the goods and chattels of the said C. G. P., from the said C. G. P.; whereas, in truth and in fact, they the said J. and P. were not then the servants of the said K. and M., nor was either of them the servant of the said K. and M.; and whereas they, the said J. and P., were not then authorized and employed, nor was either of them authorized and employed, by the said K. and M., to collect kitchen fat and wood ashes, to the great damage of the said C. G. P., to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(617) *Conspiring to get prosecutor's goods by false pretences, etc.*(q)

That A. W. and C. J., both now resident in Ipswich, in the county of Essex aforesaid, laborers, being evil disposed persons,

(q) This count was sustained in *Com. v. Warren* (6 Mass. 74), and on this account I have introduced it into the text, though I think that it is clear that in Massachusetts the form is no longer good. *Com. v. Hunt*, 4 Mete. 111; *Com. v. Eastman*, 1 Cush. 191; *Com. v. Shedd*, 7 Cush. 515. In the case of *Warren, Parsons, J.*, in disposing of the indictment, said: "The gist of the offence is the conspiracy to cheat Putnam of his shoes, and the defendants might lawfully have

and devising and contriving to cheat and defraud one M. P. of his property, on, etc., now last past, at, etc., with force and arms, did unlawfully conspire, combine, confederate, and agree together to obtain, acquire, and get into their hands and possession, of and from the said M. P., a large quantity of women's shoes; and that they the said W. and J., in pursuance of the unlawful conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had, did then and there falsely, fraudulently, unlawfully, and deceitfully pretend to and affirm to the said P. that his the said A. W.'s name was W. L., that he the said W. then lived in the town of Gloucester, in the county aforesaid, that he carried on the business of shoemaking in the said town of Gloucester, that he wanted a large number of shoes to ship to the Havana in the West Indies, that he then had a large number of shoes making for his use to be shipped to the said Havana by him, but that they could not be finished and delivered to him so soon as he should have occasion for them; and that he the said M. P., giving credit to and believing the aforesaid false, deceitful, and fraudulent pretences and affirmations of the said W. and J., and not knowing the contrary, was induced to, and then and there did deliver to the said W. and J. two hundred pairs of women's shoes, of the value of one hundred and twenty-four dollars, upon trust and credit; and that the said A. W., in pursuance of and according to the unlawful conspiracy, combination, confederacy, and agreement aforesaid, did then and there falsely, deceitfully, and fraudulently make, counterfeit, and fabricate two promissory notes of

been convicted, if the jury were satisfied on legal evidence that they were guilty of the conspiracy charged, although no act done in pursuance of it had been proved. *Com. v. Judd et al.*, 2 Mass. R. 329.

"But Warren's intent to defraud Putnam is not denied, and the question is whether the jury could lawfully infer that Johnson was an associate and confederate in the same fraudulent design. He went with Warren, he was with him in the shop when he received the shoes, and when he gave the fictitious securities. If Johnson gave no evidence to explain his connection with Warren, whence the jury might infer that it was innocent, they might infer that he was privy to Warren's want of credit, and that he had obtained the shoes fraudulently. If the evidence had rested here, the jury might have pressed it too far; but when it was proved that he received a hundred pair of the shoes, and sold them under a fictitious name, the jury might well infer that as he had his share in the plunder, he was an associate in the villainy by which it was obtained. We cannot, therefore, say that the verdict as to Johnson is against evidence, but the presumption against him is so strong that the jury were well warranted to infer his guilt in the conspiracy charged."

hand for the sum of sixty-two dollars each, bearing date the day aforesaid, one of which notes was made payable to the said M. P., or his order, in thirty days from the said date, the other of which was made payable as aforesaid, in sixty days from the said date; and that the said A. W., then and there, in pursuance of and according to the conspiracy, combination, confederacy, and agreement aforesaid, did falsely, deceitfully, and fraudulently, and with a design to deceive, cheat, and defraud the said P., counterfeit, sign, and place the said name of W. L. to each of the said notes of hand, as and for the true and real name of him the said A. W., and deliver the said notes to said P. as security for the payment of the said shoes, as and for the notes of him the said A. W.; whereas, in truth and in fact, the name of said A. W. was not W. L., and whereas, in truth and in fact, the said A. did not then live in the said town of Gloucester, nor did he then, nor at any other time, carry on the business of shoemaking in said town of Gloucester, nor did the said A. W. intend to ship the said shoes to the said port of Havana, nor had he then any quantity of shoes making or expected to be made for him to be shipped to the said Havana, or for any other purpose whatever; but the said W. was then and there a person of no business, property, credit, or character whatever, and was an idle, dissolute, and fraudulent person. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said A. W. and C. J., according to and in pursuance of the unlawful conspiracy, combination, confederacy, and agreement aforesaid, him, the said M. P., of the aforesaid two hundred pairs of shoes, in manner aforesaid, did unlawfully cheat, deceive, and defraud, to the great damage of him the said M. P., and against, etc. (*Conclude as in book 1, chapter 3.*)

(618) *Against the officers of a bank, for a conspiracy to obtain by fraudulent means discounts on state stock to a large amount.*(r)

That by an act of congress of the United States, passed on the

(r) This and the following form were sustained by the court of appeals of Maryland, in the celebrated case of *State v. Buchanan*, 5 Har. & J. 317; Wh. Cr. L. 8th ed. §§ 1348, 1349, 1376, 1382, 1400. They bear the name of Luther Martin, then attorney-general, and for accuracy and appropriateness of expression are unsurpassed. The opinion of the court has been already noticed (*ante*, 607, 608, note), but a careful examination of it is recommended to the student.

tenth day of April, in the year of our Lord, etc., at the city of Washington, entitled "An act to incorporate the subscribers to the Bank of the United States," a bank was established and chartered as a corporation and body politic, by the name and style of the "president, directors, and company of the Bank of the United States," with authority, power, and capacity, among other things, to have, purchase, receive, possess, enjoy, and retain to them and their successors, lands, rents, tenements, hereditaments, goods, chattels, and effects of whatsoever kind, nature, and quality, to an amount not exceeding in the whole fifty-five millions of dollars; to deal and trade in bills of exchange, gold and silver bullion; and to take at the rate of six per cent. per annum for and upon its loans or discounts, and to issue bills or notes signed by the president and countersigned by the principal cashier or treasurer thereof, promising the payment of money to any person or persons, his, her, or their order, or to bearer.

And that under and by virtue of the power and authority given to the said directors by said act of congress, an office of discount and deposit of the said corporation was, at the time hereinafter mentioned, regularly and duly established in pursuance of the power contained in said act at the city of Baltimore, in the state of Maryland aforesaid. (And that G. W., late of the city of Baltimore, merchant, was at the time hereinafter mentioned, and before and afterwards, one of the directors of the said Bank of the United States at Philadelphia, to wit, at the city of Baltimore aforesaid.) And that J. A. B., late of the city of Baltimore, merchant, was at the time hereinafter mentioned, and before and since, president of the said office of discount and deposit of the said Bank of the United States, in the city of Baltimore. And that J. W. M'C., late of the city of Baltimore, gentleman, was at the time hereinafter mentioned, and before and afterwards, cashier of the said office of discount and deposit of the said Bank of the United States in the city of Baltimore, to wit, at the city of Baltimore aforesaid. (And that the said G. W., so being one of the directors of the said Bank of the United States), and that the said J. A. B., so being president of the said office of discount and deposit of the said bank in the city of Baltimore, and the said J. W. M'C., so being

cashier of the said office of discount and deposit of the said bank in the city of Baltimore, being evil disposed and dishonest persons, and wickedly devising, contriving, and intending falsely, unlawfully, fraudulently, craftily, and unjustly, and by indirect means to cheat and impoverish the said president, directors, and company of the Bank of the United States (and to defraud them of their moneys, funds, and promissory notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said act of congress, from the use of their said moneys, funds, and promissory notes for the payment of money, commonly called bank notes), on the eighth day of May, in the year of our Lord, etc., at the city of Baltimore aforesaid, with force and arms, etc., did wickedly, falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree together, by wrongful and indirect means to cheat, defraud, and impoverish the said president, directors, and company of the Bank of the United States, * and by subtle, fraudulent, and indirect means and divers artful, unlawful, and dishonest devices and practices, to obtain and embezzle a large amount of money, and of promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of current money of the United States, the same being then and there the property and part of the proper funds of the said president, directors, and company of the Bank of the United States, from and out of the said office of discount and deposit of the said bank in the city of Baltimore, without the knowledge, privity, or consent of the said president, directors, and company of the Bank of the United States, and also without the privity, consent, or knowledge of the directors of the said office of discount and deposit of the said bank in the city of Baltimore, for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount, or equivalent for the use thereof, and without securing the payment thereof to the said corporation. And the more effectually and securely to perpetrate and conceal the same, that the said J. W. M'C. should from time to time falsely and fraudulently † state, allege, and represent to the said directors of the said office of discount and deposit in the city of Baltimore, that such moneys

and promissory notes, so agreed to be obtained and embezzled as aforesaid, were loaned on good, sufficient, and ample security (in capital stock of the said bank, pledged and deposited therefor, and also, should from time to time make and fabricate false statements and vouchers respecting the same; and other property and funds of the said corporation, to be laid before and exhibited to the said directors of the said office of discount and deposit of the said bank in the city of Baltimore). And that the said (G. W.) J. A. B. and J. W. M'C., being such officers of the said corporation as aforesaid, * * did then and there, in pursuance of and accordance to the said unlawful, false, and wicked conspiracy and confederacy, combination, and agreement aforesaid, by indirect, subtle and wrongful, fraudulent and unlawful means, and by divers artful and dishonest devices and practices, and without the knowledge, privity, or consent of the said president, directors, and company of the Bank of the United States, and without the privity, knowledge, or consent of the directors of said office of discount and deposit of the said bank in the city of Baltimore, obtain and embezzle a large amount of money, and of promissory notes for the payment of money, commonly called bank notes, the same being the property and part of the proper funds of the said corporation, from and out of their said office of discount and deposit in the city of Baltimore, to wit, the amount and value of one million five hundred thousand dollars, current money of the United States, for the purpose of having and enjoying the use thereof, and did have and enjoy the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount, or equivalent therefor, and without securing the payment of the said moneys, and the said promissory notes for the payment of money, commonly called bank notes; and did then and there falsely, craftily, deceitfully, fraudulently, wrongfully, and unlawfully keep and convert the same to their own use and benefit, without the knowledge, privity, or consent of the said corporation, and without the knowledge, privity, or consent of the directors of the said office of discount and deposit in the city of Baltimore; and did then and there, the more effectually to perpetrate and conceal the said conspiracy, confederacy, fraud, and embezzlement, cause and procure false and fraudulent representations, allegations,

statements, and vouchers to be made and fabricated, and the same to be exhibited to and laid before the directors of the said office of discount and deposit in the city of Baltimore, by the said J. W. M'C., as cashier of the said office of discount and deposit, respecting the said moneys, and the said promissory notes for the payment of money so obtained and embezzled as aforesaid, in which said representations, allegations, statements, and vouchers, it was then and there falsely and fraudulently represented, alleged, and exhibited, that the said moneys, and promissory notes for the payment of money, were issued on good, sufficient, and ample security, in capital stock of the said bank, pledged and deposited therefor. When, in truth and in fact, no capital stock of the said bank, and no other security was pledged or deposited therefor, as the said G. W., J. A. B., and J. W. M'C. then and there well knew; and that the said false, wicked, unlawful, and fraudulent conspiracy, confederacy, and agreement above mentioned, and the said false, wicked, unlawful, and fraudulent acts done in pursuance thereof, above set forth, were then and there made, done, and perpetrated by the said G. W., J. A. B., and J. W. M'C. in abuse and violation of their duty and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively, as such officers of the said corporation aforesaid. And that the said G. W., J. A. B., and J. W. M'C. did then and thereby falsely, wickedly, fraudulently, wrongfully, and unlawfully impoverish, cheat, and defraud the said president, directors, and company of the Bank of the United States, to the great damage of the said president, directors, and company, to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(619) *Against same for conspiring to obtain by fraudulent means the temporary use of a large quantity of notes belonging to said bank, without paying interest for them.*

That the said G. W., so being one of the directors of said Bank of the United States at Philadelphia, to wit, at Baltimore aforesaid; and the said J. A. B., so being president of the said office of discount and deposit of the said bank in the city of Baltimore; and the said J. W. M'C., so being cashier of the said office of discount and deposit of the said bank in the city of

Baltimore, being evil disposed and dishonest persons, and wickedly devising and contriving and intending, falsely, unlawfully, fraudulently, craftily, and unjustly, and by indirect means to cheat and impoverish the said president, directors, and company of the Bank of the United States, and to defraud them of their moneys, funds, and promissory notes for the payment of money, commonly called bank notes, and of their honest and fair gains to be derived under and pursuant to the said act of congress, from the use of their said moneys, funds, and promissory notes for the payment of money, commonly called bank notes, afterwards, to wit, on the eighth day of May, in the year of our Lord, etc., at the city of Baltimore aforesaid, with force and arms, etc., did wickedly, falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree together by wrongful and indirect means to cheat, defraud, and impoverish the said president, directors, and company of the Bank of the United States, and by subtle, fraudulent, and indirect means, and divers artful, unlawful, and dishonest devices and practices, to obtain and embezzle a large amount of money, and promissory notes for the payment of money, commonly called bank notes, to wit, of the amount and value of one million five hundred thousand dollars, current money of the United States, the same being then and there the property and part of the proper funds of the said president, directors, and company of the Bank of the United States, from and out of the said office of discount and deposit of the said bank in the city of Baltimore, without the knowledge, privity, or consent of the said president, directors, and company of the Bank of the United States, and also without the privity, consent, or knowledge of the directors of the said office of discount and deposit of said bank in the city of Baltimore, for the purpose of having and enjoying the use thereof for a long space of time, to wit, for the space of two months, without paying any interest, discount, or equivalent for the use thereof, and without securing the payment thereof to the said corporation; and that the said false, wicked, unlawful, and fraudulent conspiracy, confederacy, and agreement above mentioned, were then and there made, done, and perpetrated by the said G. W., J. A. B., and J. W. M'C., in abuse and violation of their duty and the trust reposed in them, and the oaths taken and lawfully sworn

by them respectively, as such officers of the said corporation as aforesaid, to the great damage of the said president, directors, and company, to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(620) *Against same for conspiring to appropriate several bills of exchange, etc.*

*Same as count on 618, omitting passages in brackets down to *, and proceed :* and that in pursuance of, and according to the said unlawful, false, and wicked conspiracy, confederacy, combination, and agreement aforesaid, the said J. W. M'C. did then and there fraudulently, secretly, and contrary to the duties of his office, give and deliver over to the said J. A. B., and the said J. A. B. did then and there fraudulently, secretly, and contrary to the duties of his office, receive and take, for the purpose of having and enjoying the benefit and use of the same for a long space of time, to wit, for the space of four months, without the privity, knowledge, or consent of the said president, directors, and company of the Bank of the United States, and without the privity, knowledge, or consent of the directors of the said office of discount and deposit of the said bank at Baltimore, as aforesaid, and without securing the payment of the value or amount of the same, certain bills of exchange, the number whereof is unknown to the jurors aforesaid, drawn upon a certain person or certain persons in London, to the jurors aforesaid unknown, to the amount in the whole of six thousand and eighty pounds sterling, lawful money of Great Britain, and equal in value to twenty-seven thousand twenty-two dollars and twenty-two cents, lawful money of the United States; which said bills of exchange, he the said J. W. M'C. had previously thereto received and taken, by virtue of his office of cashier as aforesaid, in payment of a debt which was then and there due to the said president, directors, and company of the Bank of the United States, by the Farmers' and Mechanics' Bank of Georgetown, in the District of Columbia, and which said bills of exchange were then and there in the custody and possession of him the said J. W. M'C., he being such cashier as aforesaid, as the property and part of the proper funds of the said president, directors, and company of the Bank of the United States; and the more effectually to

perpetrate and conceal the same, and in further pursuance of the said conspiracy, confederacy, combination, and agreement, the said J. W. M'C. did then and there, with the knowledge, privity, and consent of the said J. A. B., cause and procure false and fraudulent allegations, representations, and statements to be made and fabricated, and exhibit the same to, and lay the same before the directors of the said office of discount and deposit of the said Bank of the United States in the city of Baltimore, in which said allegations, representations, and statements, the said Farmers' and Mechanics' Bank of Georgetown was designedly and falsely represented as owing the aforesaid debt, for the payment of which the aforesaid bills had been previously received and accepted by him the said J. W. M'C., as aforesaid; and the same J. W. M'C., being such cashier as aforesaid, fraudulently and wickedly, and with the privity, knowledge, and consent of the said J. A. B., then and there caused and procured that no entry or notice of the receipt of the said bills of exchange, or of the delivery of them to the said J. A. B., should be taken or made in the books of account of the said office of discount and deposit in the city of Baltimore, and that no credit for the said bills of exchange should be given to the said Farmers' and Mechanics' Bank of Georgetown in the said books of accounts; and that the said false, wicked, unlawful, and fraudulent conspiracy, confederacy, and agreement above mentioned, and the said false, wicked, unlawful, and fraudulent acts, done in pursuance thereof, above set forth, were then and there made, done, and perpetrated by the said J. A. B. and J. W. M'C., in abuse and violation of their duty and the trust reposed in them, and the oaths taken and lawfully sworn by them respectively, as such officers of the said office of discount and deposit of the said bank in the city of Baltimore as aforesaid; and that the said J. A. B. and J. W. M'C. did then and there thereby falsely, wickedly, fraudulently, wrongfully, and unlawfully impoverish, cheat, and defraud the said president, directors, and company of the Bank of the United States, to the great damage of the said president, directors, and company of the said Bank of the United States, to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(621) *Against same for obtaining money from the bank by means of false entries and a fictitious draft.*

*Same as count 618, down to * *, leaving out passages in brackets, and inserting at † the averment "cause false entries to be made in the books of the said office of discount and deposit, whereby it should be falsely and fraudulently stated and represented, and should falsely and fraudulently," and then proceed :*

He the said J. A. B., with privity, knowledge, and consent of the said J. W. M'C., and without the privity, knowledge, and consent of the said president, directors, and company of the Bank of the United States, and without the knowledge, privity, or consent of the directors of the said office of discount and deposit of the said bank in the city of Baltimore, did then and there, in pursuance of, and according to the said unlawful, false, and wicked conspiracy, confederacy, combination, and agreement aforesaid, fraudulently obtain, draw out, take, and embezzle, for the purpose of applying the same to his own proper use, and without securing the repayment of the same promissory notes for the payment of money commonly called bank notes, and moneys to a large amount in the whole, to wit, to the amount of twenty-five thousand dollars, lawful money of the United States, the property, and part of the proper funds of the said president, directors, and company of the Bank of the United States, intrusted to and managed by the directors of their said office of discount and deposit in the city of Baltimore aforesaid ; and that they, the said J. A. B. and J. W. M'C., the more effectually to perpetrate and conceal the same, and in further pursuance of the said conspiracy, confederacy, combination, and agreement, afterwards, to wit, on the day and year aforesaid, and at the place aforesaid, did procure and cause to be made false entries on the books of the said office of discount and deposit, falsely representing, and did then and there falsely and fraudulently represent and allege to the directors of the said office of discount and deposit of the said Bank of the United States, that the said promissory notes for the payment of money, commonly called bank notes, and moneys were loaned on good, sufficient, and ample security, to wit, on a draft for the payment of a large sum of money, that is to say, a like sum of twenty-five thousand dol-

lars, drawn by a certain commercial firm then carrying on trade and commerce in the city of Baltimore, under the name and style of S. S. and B., upon one D. C. II. of the state of Louisiana, pledged and delivered therefor, which said draft had been remitted to the office of discount and deposit of the said Bank of the United States in the city of New Orleans (which said office last mentioned was then and there legally established at New Orleans, to wit, at Baltimore aforesaid), and that the said office of discount and deposit last mentioned was truly and justly accountable therefor, whereas, in fact and in truth, the said entries so made and procured were false; neither was such draft for the payment of money, nor was any other security pledged or delivered therefor, as they the said J. A. B. and J. W. M'C. then and there well knew; and that the said false, wicked, and unlawful and fraudulent conspiracy, confederacy, and agreement above mentioned, and the said false, wicked, unlawful, and fraudulent acts done in pursuance thereof, above set forth, were then and there made, done, and perpetrated by the said J. A. B. and J. W. M'C., in abuse and violation of their duty and the trust reposed in them, and the oaths taken and sworn by them respectively, as such officers of the said office of discount and deposit of the said bank as aforesaid; and that the said J. A. B. and J. W. M'C. did then and there thereby falsely, wickedly, fraudulently, wrongfully, and unlawfully impoverish, cheat, and defraud the said president, directors, and company of the Bank of the United States, to the great damage of the said president, directors, and company, to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(621a) *Conspiracy by false statements to obtain recognition by a stock exchange. Second count.*

And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of committing the offence hereinafter in this count mentioned, the said J. A. and W. W. were directors, and the said G. P. K. was secretary of the company in the first count mentioned, to wit, "The E. F. and G. Co. (limited)" and the said S. G. F., J. S. M., and C. K. were persons aiding and assisting in the establishment of the said company, and applica-

tion had been made on behalf of the said company to the committee for general purposes of "the said stock exchange," being the undertaking in the first count of this indictment mentioned, to order the quotation of the shares of the said new company in the official list of the "said stock exchange," under and in pursuance of a certain rule duly issued and published by the said committee, and which rule is as follows, that is to say:—

"129. The committee will order the quotation of a new company in the official list provided that the company is of *bona fide* character, and of sufficient magnitude and importance, that the requirements of rule 128 have been complied with, and that the prospectus has been publicly advertised, and agrees substantially with the act of parliament or the articles of association, and in case of limited companies contains the memorandum of association, that it provides for the issue of not less than one half of the nominal capital, and for the payment of ten per cent. upon the amount subscribed, and sets forth the arrangements for raising the capital, whether by shares fully or partly paid up with the amounts of each respectively, and also states the amount paid or to be paid in money or otherwise to concessionaries, owners of property, or others, on the formation of the company, or to contractors for works to be executed, and the number of shares, if any, proposed to be conditionally allotted.

"That two-thirds of the whole nominal capital proposed to be issued (shares reserved, or granted in lieu of money payments to concessionaries, owners of property, or others, not being counted in such two-thirds) have been applied for by and unconditionally allotted to the public, that the articles of association restrain the directors from employing the funds of the company in the purchase of its own shares, and that a member of the stock exchange is authorized by the company to give full information of the undertaking, and be able to satisfy the committee as to all particulars they may require.

"In cases where fully paid shares have been granted in lieu of money payments, an official certificate will be required that the contract providing for the issue of such shares has been filed with the registrar of joint stock companies, as prescribed by the 25th section of the companies amendment act, 1867.

“ Foreign companies partly subscribed for and allotted in this country shall not, unless under special circumstances, be allowed a quotation in the official list until they have been officially quoted in the country to which they belong.”

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. A., W. W., G. P. K., J. S. M., C. K., and S. G. F. had applied to and requested one R. W. C. and others, then being a firm of stock brokers and members of the said stock exchange, and authorized the said R. W. C. and others to give the information hereinbefore mentioned, and to apply to the said committee to order the said quotation of the shares of the said company in the official list of the said stock exchange, and the said G. P. K. had employed the said R. W. C. and others to sell divers shares of the said company, to wit, 5000 shares, on behalf of certain alleged vendors of patents, and the said R. W. C. and others had bargained for the sale of 300 of the said shares.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. A., W. W., G. P. K., J. S. M., C. K., and S. G. F. did heretofore, to wit, on, etc., and within the jurisdiction of, etc., unlawfully conspire, combine, confederate, and agree together, and with divers other persons whose names are to the jurors aforesaid unknown, by divers false pretences, and artful and subtle means, devices, and stratagems, to injure and deceive the said members of the said committee, and to induce them, contrary to the true intent and meaning of the said rules hereinbefore in this count and in the first count of this indictment mentioned, to order a quotation of the shares of the said company in the official list of the said stock exchange, and thereby to induce and persuade divers of the liege subjects of our said lady the queen, who should thereafter buy and sell the shares of the said company, to believe that the said company was duly formed and constituted, and had in all respects complied with the rules and regulations of the said undertaking in the first count of this indictment described and mentioned, to wit, the said stock exchange, so as to entitle the said company to have their shares quoted in the official list of the said stock exchange.

And that the said J. A., W. W., G. P. K., J. S. M., C. K.,

and S. G. F., and the said other persons whose names are to the jurors aforesaid unknown, in pursuance of the said unlawful conspiracy, combination, confederacy, and agreement, unlawfully and knowingly did falsely pretend to S. H. D., T. F., and others, being members of the said committee for general purposes of the said stock exchange, that the number of shares of the said company applied for by the public was then 34,365, that the number of shares of the said company allotted unconditionally was then 34,365, and that the amount received by the said company thereon was on application 10s. per share, amounting to the sum of £17,182 10s., that 15,000 of the said shares had then been allotted to the patentee, that no shares had been conditionally allotted, and did thereby induce the said committee for general purposes of the said stock exchange to order the said shares to be quoted in the official list of the said stock exchange, on and after the, etc., day of, etc., in the year aforesaid, against the peace of, etc.(s) (*Conclude as in book 1, chapter 3.*)

(622) *For a conspiracy by the maker of two promissory notes, and two other persons, fraudulently to obtain the said notes from the holder.(t)*

That B. C. W., late of the parish of Saint Martin-in-the-Fields, in the county of Middlesex, laborer, L. P. G., late of the same place, laborer, and J. M., late of the same place, laborer, wickedly devising and intending to cheat, deceive, and defraud one E. L. H., on the twentieth day of March, in the year of our Lord with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did, amongst themselves, unlawfully conspire, combine, confederate, and agree together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves of and from the said E. L. H. divers valuable securities of the said E. L. H.; that is to say, a certain promissory note for the payment of six thousand pounds, made by the said J. M.; and a certain other promissory note for the payment of five thousand pounds,

(s) This count was sustained July, 1876, by Cockburn, C. J., and Blackburn and Field, J.J. *R. v. Aspinall*, 13 Cox, C. C. 231. This ruling was affirmed by the court of appeal. *R. v. Aspinall*, 18 Cox, C. C. 563.

(t) 1 Cox, C. C. Appendix, p. xiii.

made by the said J. M. And that, in pursuance of the aforesaid conspiracy, combination, and confederacy and agreement amongst them as aforesaid, the said B. C. W., afterwards, to wit, on the twenty-sixth day of March, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did falsely, fraudulently, and deceitfully pretend to the said E. L. H. that the said B. C. W. had a friend who wished to invest twenty thousand pounds in the said J. M.'s paper, meaning thereby that the said B. C. W. had a friend who was willing and desirous to discount bills of exchange accepted by, or promissory notes made by, the said J. M. to the amount of twenty thousand pounds, and by which friend the said B. C. W. could and would procure the said promissory note of and belonging to E. L. H. to be discounted, by means of which said false pretences, in pursuance of the aforesaid conspiracy, combination, confederacy, and agreement, the said B. C. W., L. P. G., and J. M., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did unlawfully, falsely, fraudulently, and deceitfully obtain, acquire, and get into their hands and possession the said promissory notes of and belonging to the said E. L. H.; whereas, in truth and in fact, the said B. C. W. had not any friend, or other person, who wished to invest twenty thousand pounds, or any other sum of money, in the said J. M.'s paper, or by whom he could procure the said promissory notes of the said E. L. H. to be discounted; and whereas, in truth and in fact, the said B. C. W. did not procure the said promissory notes to be discounted; and whereas, in truth and in fact, the said B. C. W. did not intend to procure the said promissory notes to be discounted; but, on the contrary thereof, withdrew himself with the said promissory notes; to the great damage of the said E. L. H., and against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said B. C. W., L. P. G., and J. M., wickedly devising and intending to cheat, deceive, and defraud the said E. L. H., afterwards, to wit, on the said twentieth day of March,

in the year aforesaid, with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did, amongst themselves, unlawfully conspire, combine, confederate, and agree together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves of and from the said E. L. H. divers valuable securities of the said E. L. H.; that is to say, a certain promissory note for the payment of five thousand pounds, made by the said J. M., and a certain other promissory note for the payment of five thousand pounds, made by the said J. M. And that, in pursuance of the aforesaid conspiracy, combination, confederacy, and agreement amongst them, so had as aforesaid, the said B. C. W. afterwards, to wit, on the twenty-sixth day of March, in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did falsely, fraudulently, and deceitfully pretend to the said E. L. H. that the said B. C. W. had a friend who was willing and desirous to discount any bills of exchange accepted, or promissory notes made by the said J. M., to the amount of twenty thousand pounds, and that he could and would procure the said promissory notes of the said E. L. H., so made by the said J. M. as aforesaid, to be discounted by the said friend of the said B. C. W.; by means of which false pretences, in pursuance of the aforesaid conspiracy, combination, confederacy, and agreement, the said B. C. W., L. P. G., and J. M., afterwards, to wit, on the day and year last aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did falsely, fraudulently, and deceitfully obtain, acquire, and get into their hands and possession the said promissory notes of the said E. L. H.; whereas, in truth and in fact, the said B. C. W. had not any friend or other person who was willing or desirous to discount bills of exchange accepted, or promissory notes made by the said J. M., to the amount of twenty thousand pounds, or any amount whatever; and whereas, in truth and in fact, the said B. C. W. did not procure the said promissory notes to be discounted; and whereas, in truth and in fact, the said B. C. W. did not intend to procure the said promissory notes to be discounted, but on the contrary thereof, withdrew himself with the said promissory notes; to the great damage of the said E. L. H., and against the peace, etc.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said B. C. W., L. P. G., and J. M., wickedly devising and intending to cheat, deceive, and defraud the said E. L. H., afterwards, to wit, on the said twentieth day of March, in the year of our Lord with force and arms, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said court, did, amongst themselves, unlawfully conspire, combine, confederate, and agree together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves of and from the said E. L. H. divers valuable securities of the said E. L. H., that is to say, a certain promissory note for the payment of six thousand pounds, and of the value of six thousand pounds, and a certain other promissory note for the payment of five thousand pounds, and of the value of five thousand pounds; to the great damage of the said E. L. H., and against the peace, etc.

(623) *Conspiracy and cheat, under pretence of being a merchant, with overt act.*(u)

That P. R., J. B., and A. F., all late of, etc., yeomen, being persons of evil name and fame and dishonest conversation, and not caring to get their livelihood by honest labor, but by fraud and deceit maintaining their idle course of life, on, etc, at, etc., with force and arms, unlawfully and wickedly among themselves did combine, conspire, and agree together one M. E., widow, there resident, of her goods and chattels, to wit, of a large quantity of oaken staves and heading, of the value of fifty pounds, lawful money of Pennsylvania, and more falsely and fraudulently, by false pretences, deceit, practice, and covin, to cheat, deceive, and defraud, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

In pursuance of such their wicked conspiracy, combination, and agreement aforesaid, the said P. R. afterwards, to wit, on, etc., deceitfully bargained with the said M. E., to deliver to him the said P. four thousand nine hundred and fifty hogsheads'

(u) Drawn in 1790, by Mr. Bradford, then attorney-general of Pennsylvania.

staves and two thousand two hundred hogsheads' heading, to the value of fifty-two pounds eighteen shillings and fourpence, and upon such bargaining the said P. R. falsely took upon himself and pretended to be a merchant resident in the city of Philadelphia, and then and there personated a merchant of Philadelphia as if he had been a true merchant, and that he the said P. would duly pay to the said M. the aforesaid sum when he should be desired so to do, and that the said A. F. then and there took upon himself and pretended to be a laborer, employed and paid by him the said P., to receive and move the said staves and headings, and then and there did falsely affirm to the said M. E. that the said P. was a merchant as aforesaid; and that the aforesaid M. E., giving credit to the said fictitious assumptions, personatings, and deceits, did then and there deliver to the said P. R. and A. F. the said staves and heading, of the value aforesaid; whereas, in fact and in truth, the said P. R. was not a true merchant as aforesaid, nor was he used to get his living by buying and selling, nor was the said A. F. a laborer employed and paid by the said P. in manner aforesaid, nor did the said P., A., or J., or either of them, intend or design to pay or satisfy the said M. E. for the said staves, but the same to their own use afterwards, to wit, on the same day and year, fraudulently did dispose of and convert, and the said M. of the same did then and there cheat and defraud, to the great damage of her the said M., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That the said J. afterwards, on, etc., in further pursuance of such their wicked intention, in conspiracy and agreement as aforesaid, at, etc., falsely did pretend and affirm to the said M. E. that the said P. R. was a merchant as aforesaid, and that the said P. R. was then sick, and had sent him the said J. to purchase a further quantity of staves of her the said M., with an intent to defraud and cheat the said M. of a further large quantity of staves in manner aforesaid, to the evil example of all others in the like case offending, to the great damage of her the said M., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(624) *Conspiracy to sell lottery tickets.(v)*

That defendants, etc., did conspire to sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket, and tickets in a lottery not authorized by the laws of this commonwealth, against, etc. (*Conclude as in book 1, chapter 3.*)

(625) *Conspiracy for enticing a person to play at unlawful games, etc.(w)*

That J. D., G. B., and J. D., all late of, etc., yeomen, on, etc., unlawfully, wickedly, and deceitfully did combine, conspire, and agree together to cheat and defraud one S. B., and his goods and money, by art, practice, and fraud, into their custody and possession to obtain and get; and in pursuance of such their unlawful and wicked conspiracy and agreement aforesaid, they the said J. D., G. B., and J. D., afterwards, to wit, the same day and year, and at, etc., did challenge and provoke him the said S. B. at a certain unlawful game at cards to play and game for money, and then and there, by fraud, deceit, art, practice, and covin, at the said unlawful game, and by laying wagers thereon, did unlawfully and fraudulently obtain and get into their possession the sum of six pounds seven shillings and sixpence, of the moneys of the said S. B., and the same moneys then and there did take and carry away, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(626) *Conspiracy to make a great riot, and to demolish walls, buildings, and fences, with overt acts.(x)*

That A. B., late of, etc. (*naming the other defendants*), together with divers other evil disposed persons, to the jurors aforesaid as yet unknown, heretofore, to wit, on, etc., with force and arms, at, etc., aforesaid, did unlawfully conspire, combine, confederate, and agree together unlawfully, riotously, and routously to break down, pull down, prostrate, demolish, and destroy a certain wall, and

(v) *Com. v. Gillespie*, 7 S. & R. 469; Wh. Cr. L. 8th ed. §§ 1345, 1348, 1352, 1422, 1493, 1496, 1503. See this form examined, *supra*, note to 607, 608.

(w) Drawn by Mr. Jared Ingersoll, attorney-general of Pennsylvania, in 1789.

(x) Dickinson's Q. S. 6th ed. 353.

certain other erections, buildings, posts, pales, rails, and fences of one C. D., there then erected, standing, and being near a certain dwelling house and premises of the said C. D., there situate. And the jurors, etc., that in pursuance of the said conspiracy, combination, confederacy, and agreement, so as aforesaid had, they the said A. B., etc., afterwards, to wit, on, etc., aforesaid, at, etc., aforesaid, with force and arms, did unlawfully, riotously, and routously assemble and meet together, near to the said dwelling-house and premises of the said C. D., and near to the dwelling-houses and premises of divers other liege subjects of the said state there, and being so assembled and met together, then and there unlawfully, riotously, and routously did make a great noise, riot, disturbance, and affray, and stayed and continued there making such noise, riot, disturbance, and affray for a long time, to wit, for the space of five hours, and thereby for and during all that time there greatly disturbed, disgusted, terrified, and alarmed the said C. D. and his wife and family, in the peaceable possession and enjoyment of his said dwelling-house and premises, and also greatly disturbed, disquieted, terrified, and alarmed the said other liege subjects of the said state, and residing in the said dwelling-houses and premises, and then and there unlawfully, riotously, and routously did break down, pull down, prostrate, demolish, and destroy great part of the said wall, to wit, twenty perches of the said wall, then and there standing and being, and the materials thereof, to wit, five hundred bricks, of a large value, to wit, etc., unlawfully, riotously, routously, and wantonly did cast and scatter into and about the common and public highway of the said state there, to the great damage and terror of the good citizens of said state, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(627) *Second count, without overt acts.*

That the said A. B., etc., together with divers other evil disposed persons, to the jurors aforesaid as yet unknown, heretofore, to wit, on, etc., aforesaid, with force and arms, at, etc., aforesaid, did unlawfully conspire, combine, confederate, and agree together unlawfully to break down, demolish, prostrate, and destroy certain other erections, buildings, posts, pales, rails, and fences, then and there standing, and being the property of, and

belonging to, the said citizens of said state, there then inhabiting and residing, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(628) *Conspiracy to prevent, by force and arms, the use of the English language in a German congregation, and to oppose, "with their bodies and lives," and by all means lawful and unlawful, the introduction of any other language but the German. Overt acts, riot and assault.*(y)

That F. E. *et al.*, on, etc., were members of the German Evangelical Lutheran congregation, in and near Philadelphia. And so being severally and respectively members of the said congregation, they, the said F. E. *et al.*, unlawfully and wickedly combining, conspiring, and confederating together, to acquire for themselves unjust and illegal authority and power in the said congregation, and to distress, oppress, and aggrieve the peaceful citizens of this commonweath, also members of the said congregation, and to prevent them from the free, lawful, and proper enjoyment of the rights and privileges thereof, afterwards, to wit, on the day and year aforesaid, at the city of Philadelphia aforesaid, and within the jurisdiction of this court, unlawfully assembled and met together, and being so assembled and met together, did then and there unjustly and unlawfully and oppressively conspire, combine, confederate, and agree together to prevent, by force and arms, the use of the English language in the worship of Almighty God among the said congregation, and for that purpose did then and there determine and firmly bind themselves before God, and solemnly to each other, to defend, with their bodies and lives, the German divine worship, and to oppose, by

(y) *Com. v. Eberle*, Pamph. 218; 3 S. & R. 9; Wh. Cr. L. 8th ed. §§ 1348, 1353. This indictment was prepared by very eminent counsel, and was tried before Yeates, J., at nisi prius, in 1816. The question whether it set forth an indictable offence was earnestly argued during trial, but under instructions from the court, the jury found the defendants guilty on both counts. No motion in arrest of judgment was made, though a motion for a new trial was strenuously urged before the court in banc, by the experienced and able counsel for the defendants, Mr. Levy and Mr. Rawle. It would seem from this, that the correctness of the indictment was conceded; and in fact, in the opinions of both Tilghman, C. J., and Yeates, J., the agreement by the defendants to oppose the introduction of the English language "with their bodies and lives," and by all means lawful and unlawful, is treated as constituting an indictable offence, and the overt acts are considered as mere aggravation.

every means lawful and unlawful, the introduction of any other language into the churches ; and the said F. E. *et al.*, and each of them, in pursuance of the said unlawful and oppressive conspiracy, combination, confederacy, and agreement so formed and made as aforesaid, afterwards, to wit, on, etc., at the city of Philadelphia aforesaid, and within the jurisdiction of this court, at an election then and there held by the members of said congregation for certain officers of the same, to wit, for elders and wardens, did unlawfully and oppressively, and with force and violence, riotously and routously make and raise, and cause to be made and raised, a great noise, tumult, riot, and disturbance, and then and there, in further pursuance of the said unlawful and oppressive conspiracy, combination, confederacy, and agreement, so formed and made as aforesaid, did assault, beat, and wound certain members of the said congregation, to wit, for the better carrying on the said unlawful and oppressive conspiracy, combination, confederacy, and agreement into effect and execution, to the great damage, oppression, and grievance of the members of the German Evangelical Lutheran congregation in and near Philadelphia aforesaid, to the evil and pernicious example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count, omitting overt acts, and charging the mere conspiracy.

(629) *Conspiracy to produce abortion on a woman not quick.*(z)

That the said W. B. T., etc., being persons of evil minds and dispositions, on, etc., at, etc., and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate, and agree together, in and upon the body of one S. R. S. an assault to make, with a wicked intent, to wit, to cause and procure the said S. to miscarry and to bring forth a certain child, with which she was then big and pregnant, dead, to the great damage of the said S., to the evil example, etc., and against, etc. (*Conclude as in book, 1 chapter 3.*)

(z) These counts were sustained on special demurrer, by the supreme court of Pennsylvania, in *Com. v. Demain*, 6 Penn. L. J. 29 ; Brightly R. 441 ; Wh. Cr. L. 8th ed. §§ 1364, 1389. See *supra*, 607-8, note.

(630) *Second count, with overt act.*

That the said W. B. T., etc., being such persons as aforesaid, on the day and year aforesaid, in the county aforesaid, and within the jurisdiction of the said court, unlawfully and wickedly did conspire, combine, confederate, and agree together, to cause and procure the said S. R. S. to miscarry and to bring forth a certain child, with which she was then big and pregnant, dead, to the great damage of the said S. And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said defendants, in pursuance of and according to the said conspiracy, combination, confederacy, and agreement between them the said defendants, so as aforesaid had, on the day and year aforesaid, in the county aforesaid, and within the jurisdiction of the said court, in and upon the body of the said S., then and there being pregnant and big with a certain other child, did make an assault, and her, the said S., then and there did bruise, wound, and ill-treat, so that her life was thereby greatly despaired of, and a certain instrument, made of silver or other metal, in the shape and form of a hook, up and into the womb and body of the said S. then and there wickedly, violently, and inhumanly did force and thrust, with a wicked intent to cause and procure the said S., as aforesaid, to miscarry and abort as aforesaid, and to kill and murder the said child, by reason whereof, and by means of which said last mentioned premises, the said child was killed and its life destroyed and taken away in its mother's womb; and the said S., afterwards, to wit, on, etc., in the year aforesaid, miscarried and was aborted of the said child, being a female child, to the great injury of the said S., to the evil example, etc. (*Conclude as in book 1, chapter 3.*)

(631) *Conspiracy by persons confined in prison, to effect their own escape and that of others.(a)*

That A. B., C. D., and E. F., all of said B., laborers, on, etc., at, etc., were persons lawfully confined in the commonwealth's prison, situated in B., in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prison, by divers legal processes then and there in force against them the said A. B., C. D., and E. F. (*state the cause of the detention of*

(a) 3 Chit. C. L. 1150.

each of the defendants), and that the said A. B., C. D., and E. F., unlawfully contriving and intending to effect the escape of themselves and divers other persons, to the said jurors unknown, who were then and there prisoners lawfully confined in the said prison, and in the custody of the keeper thereof, from out of said prison, did then and there conspire, combine, confederate, and agree together, unlawfully to effect the escape of themselves, the said A. B., C. D., and E. F., and the said other prisoners, then so lawfully confined in said prison, from and out of the same; against, etc. (*Conclude as in book 1, chapter 3.*)

The same form may be used when the design of the conspirators is to effect their own escape only, and not that of others, by omitting the allegation of divers other persons then and there lawfully confined, etc.

(632) *By prisoners to escape; with overt act, attempting to blow up the wall of a prison with gunpowder.*(b)

That A. B., C. D., and E. F., late of, etc., laborers, at the time next hereafter mentioned, were prisoners lawfully confined in the commonwealth's prison, situated in B. aforesaid, in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prisoners, by virtue of divers legal processes then in legal force against them; and that the said A. B., C. D., and E. F., contriving and intending to break down, blow up, demolish, prostrate, and destroy a certain part of the wall of said prison belonging to and inclosing the same, and thereby to effect the escape of themselves and of divers other prisoners, then lawfully confined in said prison, and in the lawful custody of the keeper thereof, from and out of the said prison, on the day of now last past, at in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate, and agree among themselves for the purpose aforesaid; and that in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, they, the said A. B., C. D., and E. F., did then and there make, and cause and procure to be made, a certain large hole and breach in the said wall of the said prison, of the length

(b) 3 Chit. C. L. 1151; Davis's Prec. 106.

of six feet, and of the width of six feet; and then and there unlawfully and wickedly put. placed, and laid a large quantity of gunpowder, to wit, ten pounds of gunpowder, into the said hole and breach, so as aforesaid made in the wall aforesaid, with intent to set fire to the said gunpowder, and thereby to break down, blow up, demolish, prostrate, and destroy part of the said wall, and by the means last mentioned to effect the escape of themselves and the said other prisoners so confined in the said prison. and in the lawful custody of the keeper thereof, from and out of the same, against, etc. (*Conclude as in book 1, chapter 3.*)

(633) *By prisoners to effect their escape; with overt act, breaking down part of the wall of the prison.(c)*

That A. B., C. D., and E. F., all of laborers, at the time next hereafter mentioned, were prisoners, lawfully confined in the commonwealth's prison, situated at B., in the county aforesaid, and then and there lawfully detained in the custody of the keeper of said prison, by divers legal processes then in force against them; and that they, the said A. B., C. D., and E. E., unlawfully contriving and intending to break down, demolish, prostrate, and destroy part of the wall belonging to and inclosing the said prison, and thereby unlawfully to effect the escape of themselves, the said A. B., C. D., and E. F., and divers other prisoners then lawfully confined in said prison, and in the custody of the keeper thereof, from and out of the same, on at in the county aforesaid, did unlawfully conspire, combine, confederate, and agree among themselves, and meet together for the purposes aforesaid; and being so assembled and met together, did then and there, in pursuance of the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, unlawfully, and wickedly begin to break down, demolish, prostrate, and destroy part of the said wall, with intent thereby unlawfully to effect the escape of themselves and the said other prisoners so there confined in the said prison, and in the custody of the keeper thereof; against, etc. (*Conclude as in book 1, chapter 3.*)

(634) *Conspiracy to impose on the public, by the manufacture of spurious indigo, with intent to sell the same as genuine indigo of the best quality.*(d)

That A. B., C. D., and E. F., all of B., in the county of S., laborers, devising and fraudulently intending to acquire and get into their hands and possession the moneys, goods, and property of the citizens of this commonwealth, by fraudulent and dishonest means, on, etc., at, etc., did falsely, fraudulently, and unlawfully, conspire, combine, confederate, and agree among themselves to mix, compound, and manufacture certain articles and materials hereafter mentioned, into the form and color and to the resemblance of good and genuine indigo of the best quality, and of foreign growth and manufacture, with the fraudulent intent and design, that the base materials to be mixed, compounded, and manufactured as aforesaid, should be exposed to sale, and that the same should in fact be sold to the citizens of this commonwealth and others as and for good and genuine indigo of the best quality, and of foreign growth and manufacture. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B., C. D., and E. F., in pursuance of and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had among themselves, on the day and year last aforesaid, at B. aforesaid, in the county aforesaid, did fraudulently mix and compound, with a certain quantity of genuine indigo of foreign growth and manufacture, certain other articles and materials, to wit, starch, blue vitriol, nutgalls, alum, and a decoction of logwood, in such quantities and proportion, as thereby to increase the quantity of the aforesaid genuine indigo, when mixed and compounded as aforesaid, to three times the quantity and number of pounds' weight thereof, and having so mixed and compounded the same,

(d) This form is the same as that used in *Com. v. Judd* (2 Mass. 329). with the exception of the alterations there recommended by the court. "The latter part of the indictment in this case," says Mr. Davis (*Proc.* 105), "is left out of this precedent, which is conformable to the decision of the court. The chief justice and defendant's counsel speak of the *different counts* in the indictment. There was but one count in the indictment, and when the second and third counts are referred to, it can apply only to the different allegations in the body of the indictment, introduced as usual, by the words, 'and the jurors aforesaid, upon their oaths aforesaid, do further present.'"

did then and there so manufacture and work up the same and the base materials and composition aforesaid, as to give the same the false appearance and resemblance of good and genuine indigo of the best quality and of foreign growth and manufacture, and with the fraudulent intent and purpose, that the purchaser or purchasers thereof should be cheated and defrauded, against, etc. (*Conclude as in book 1, chapter 3*)

(635) *Conspiracy to publish fraudulent bank notes with intent to cheat the public.*(e)

That J. W. R., late of, etc., yeoman, and N. C., late of, etc., yeoman, devising and fraudulently intending to acquire and get into their hands and possession the moneys, goods, and property of the citizens of this commonwealth by fraudulent and dishonest means, on, etc., at Pittsburg, in the county aforesaid, did falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree among themselves to make, utter, and publish certain false, forged, and counterfeited bank notes of the Mineral Bank of Maryland, in the form and to the resemblance of good, genuine, and true bank notes of the Mineral Bank of Maryland, with the fraudulent intent and design that the said false, forged, and counterfeited bank notes of the said Mineral Bank of Maryland should be uttered, published, paid, and passed to the citizens of this commonwealth and others, as and for good, genuine, and true bank notes of the Mineral Bank of Maryland, and with intent to cheat and defraud *the president, directors, and company of the Mineral Bank of Maryland*, and (f) divers the good citizens of this commonwealth, *contrary to the form of the act of the general assembly in such case made and provided*, (g) to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(635a) *Conspiracy to get up false recommendations of character.*

The jurors for, etc., upon their oath present, that heretofore, and before the committing of the offence hereafter in this count mentioned, a certain number of men had been duly appointed

(e) This form was sustained in *Com. v. Clary*, 4 Barr, 210.

(f) The italicized passages were held by the court to be surplusage.

(g) The italicized passages were held by the court to be surplusage.

to be a police force for the city of L. and the liberties thereof, under and in pursuance of the provisions of an act made and passed in a session of parliament, holden in the second and third years of the reign of her present majesty Queen Victoria, intituled "An act for regulating the police," etc., and that one J. F. had been appointed, and at the time of the committing the offence hereafter in this count mentioned, was the commissioner of the said police force of, etc., and the liberties thereof, under and in pursuance of said act; and that it was the duty of the said J. F., as commissioner aforesaid, from time to time to appoint fit and proper men, and men of good character, to be and form part of the said police force of, etc., and to be sworn in as constables for preserving the peace, and preventing robberies and other felonies, and apprehending offenders against the peace. And the jurors aforesaid, upon their oath aforesaid, do further present, that one M. T., on, etc., at, etc., and within the jurisdiction of the said court, well knowing the premises, and that he, the said M. T., was not a person of good character, and was not a fit and proper person to be appointed to form part of the said police force of the said city and the liberties thereof, and to be sworn in as a constable for preserving the peace and preventing robberies and other felonies, and apprehending offenders against the peace, and intending to deceive the said J. F., so being such commissioner as aforesaid, and to cause him to believe that he, the said M. T., was a person of good character, and that he, the said M. T., had been in the service of one G. H. in the capacity of porter, and that the conduct of the said M. T. had been good during the time he was in the service of the said G. H., and that he, the said M. T., was a fit and proper person to be appointed to form part of the said police force of the said city and the liberties thereof, and to be sworn in as a constable for preserving the peace and preventing robberies and other felonies, and apprehending offenders against the peace as aforesaid, and to induce the said J. F. to appoint him, the said M. T., to be one of the said police force, and to be sworn in as a constable as aforesaid, unlawfully, wilfully, falsely, knowingly, and maliciously did forge and counterfeit, and cause and procure to be forged and counterfeited, a certain certificate of the character of him the said M. T., well knowing the same to be false and

untrue, which said false, forged, and counterfeited certificate was and is in words and figures following, that is to say :—

“Certificate of character from the candidate’s last employer.

“26th day of April, 1864.

“I, G. H., do hereby declare that I have attentively read the annexed examination of M. T., and I have no reason whatever to question its accuracy, and that the said M. T. has lived with me in the capacity of porter, etc., from October, 1862, to April, 1864, during which time I have found him to be sober, honest, and well behaved ; and I consider him, from his uniformly good conduct, general intelligence, and sound health, to be well qualified to fill the situation of constable of the city of London police force, and recommend him accordingly to the commissioner.

“The said M. T. was not recommended to me by any one save by his testimonials.

“(Signature)

GEORGE HOOKINS.

“(Occupation)

Wine and spirit merchant.

“(Residence)

Croyden.”

With intent then and there, in so doing, to injure, prejudice, deceive, and defraud, to the evil example of all other persons in the like case offending, etc.(h) (*Conclude as in book 1, chapter 3.*)

(635b) *Conspiracy by city officials to defraud city by false appraisalment. (In substance.)*

That J. W., R. J., G. H. P., E. C., and J. C. Y. (one of the defendants), were commissioners to make an estimate of the damages to be sustained by any owner or owners of the lands and real estate which the mayor and common council had then and there determined to take and appropriate for the opening of F. street, in the city of N. ; and that said Y. was chairman of said commissioners.

That one J. W. G. was the owner and possessor of a certain lot, a description of the same being set forth.

That the commissioners prepared a map which exhibited the location and course of said F. street, and the location of the said several lots to be taken in opening said street ; and that in

laying and opening the same, a certain portion of the lot of the said G. was required, and which portion was described.

The charge of conspiracy was in these terms: "And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said J. C. Y., so being then and there one of the said commissioners of the opening of said F. street as aforesaid, and chairman of the said commission on the same, and the said W. S., being then and there an alderman aforesaid of said city of N. as aforesaid, being evil disposed and dishonest persons, and wickedly devising, contriving, and intending, knowingly, corruptly, and unlawfully to cheat and defraud the mayor and common council of the city of N., of the money of the said mayor and common council of the city of N., on, etc., at, etc., and within the jurisdiction, etc., did wickedly, falsely, fraudulently, and unlawfully conspire, combine, confederate, and agree together, to cheat and defraud the said mayor and common council of the city of N., of the moneys, to wit, of the sum of \$1000, of the said mayor and common council of the city of N., and other valuable things."

The following overt acts are then set forth: That the defendants, in pursuance, etc., procured the said G. to sell and convey to one T., who therein acted for himself and as trustee for said S., the said tract of land for the sum of \$900; and that said sum was the full and fair value of said lot; that the said Y., knowing the same to be the full and fair value of said lot, and knowing that the value of the part of the same taken as before mentioned for the said street, and the damages of the said T. and said S. by reason of the taking thereof, were less than the said sum of \$900, did, in pursuance, etc., wickedly, corruptly, and unlawfully refuse and neglect to inform the other said commissioners that the said lot had been sold for the said sum of \$900, and that the value of the part taken for said street, being but a portion thereof, was less than said sum, and then and there by "such refusal and neglect, and by other unlawful means," did cause and procure said commissioners to estimate and assess, as and for the damages which the said T. and S. sustained in respect of the lot so taken, the sum of \$1300; and that said commissioners, the said Y. being one of them, signed a report, certificate, and map to that effect; that

said Y. afterwards presented said certificate, report, and map to the common council, and said damages were therefore paid, etc.(i)

(636) *For conspiracy to defraud intending emigrants of their passage-money by pretending to have an interest in certain ships.(j)*

That C. J. T., late of the city of London, laborer, and H. G. M., late of the same place, laborer, on the first day of June, in the year of our Lord with force and arms, at the parish of in the city of London, and within the jurisdiction of the central criminal court, together with divers other evil disposed persons, to the jurors aforesaid unknown, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together to open a certain office, as and for the office of a pretended company, called the "Australian Gold and General Mining Company," and by falsely and fraudulently representing to J. J., J. G., and T. B., that the said company had chartered divers vessels, for the purpose of conveying passengers to Port Philip, in Australia, and that the said C. J. T. and the said H. G. M. were authorized by the said company to sell and dispose of berths to persons contracting to become passengers on board the said vessels, to obtain of and from the said J. J., J. G., and T. B. divers large sums of money, of the moneys of the said J. J., J. G., and T. B. respectively, and to cheat and defraud them thereof. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year aforesaid, at London aforesaid, and within the jurisdiction of the said court, the said C. J. T. and the said H. G. M., together with the other evil disposed persons to the jurors aforesaid unknown, in pursuance of the said conspiracy, combination, and agreement, so had by and amongst them as aforesaid, did then and there open a certain office in the said city of London, and did then and there falsely and fraudulently pretend and

(i) It was held in *State v. Young*, 37 N. J. L. 184, on the above indictment, that a general charge of a conspiracy to cheat is sufficient without setting forth the means to be used; and that in any view a charge of a conspiracy to cheat a municipality imports an indictable offence, on the ground of the public character of the corporation. It was also held that in setting forth in the indictment an overt act, it is not necessary to state all the means used in the execution of the plot.

(j) 6 Cox, C. C. Appendix, p. lxxxi.

advertise that the said office was the office of a certain company then and there established, for the purpose of promoting the emigration of her majesty's liege subjects to parts beyond the seas, called the "Australian Gold and General Mining Company," to wit, at London aforesaid, and within the jurisdiction of the said court. And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the same day and year aforesaid, at London aforesaid, and within the jurisdiction of the said court, the said C. J. T. and the said H. G. M., in pursuance of the said conspiracy, combination, and agreement, so had and made between themselves and the other evil disposed persons aforesaid, did falsely pretend to the said J. J., J. G., and T. B., that divers vessels, and, amongst others, certain vessels called respectively the "Camilla," the "Medicis," and the "Janet Mitchell," had been chartered by the said company to convey passengers from the port of London to Port Philip, in Australia, and that the said C. J. T. and H. G. M. had full and legal power and authority to secure and provide for the conveyance of the said J. J., J. G., and T. B., as passengers on board the said vessels, or some or one of them; by means of which said false pretences and of the premises in this count mentioned, and in pursuance of the conspiracy, combination, and agreement aforesaid, the said C. J. T. and H. G. M. did then and there unlawfully and fraudulently obtain of and from the said J. J. the sum of eleven pounds in money, of the moneys of the said J. J., of the said J. G. the sum of nine pounds in money, of the moneys of the said J. G., and of the said T. B. the sum of thirty pounds in money, of the moneys of the said T. B., with intent then and there to cheat and defraud the said J. J., the said J. G., and the said T. B., of the said sums of money, of the moneys of the said J. J., the said J. G., and the said T. B. respectively; to the great damage, injury, and deception of the said J. J., the said J. G., and the said T. B., and against the peace, etc.

Second count.

That the said C. J. T. and H. G. M. afterwards, to wit, on the day and year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, together with divers other evil

disposed persons to the jurors aforesaid unknown, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together, by divers false pretences and subtle means and devices, to cause it to be believed, that a certain company was established at a certain office in the said city, to wit, for the purpose of promoting the emigration of her majesty's liege subjects to parts beyond the seas, and that the said C. J. T. and H. G. M. were the agents of and for the said company, and that the said company had then chartered certain ships to sail from London to a place beyond the seas, to wit, Australia, and that the said C. J. T. and H. G. M. then could, as such agents of and for the said company, contract for the carrying of passengers, and provide that passengers should be carried by the said ships, chartered by the said company, from London to Australia as aforesaid, and by means of the said belief to obtain from divers liege subjects of our lady the queen, to wit, J. J., J. G., and T. B., divers large sums of money, of the moneys of the said J. J., of the moneys of the said J. G., and of the moneys of the said T. B., and to cheat and defraud the said J. J., J. G., and T. B. of their said moneys respectively ; and in pursuance of the said last mentioned conspiracy, the said C. J. T. and H. G. M. did then and there open an office in the said city of London, and falsely pretend that it was the office of the said company, and the said C. J. T. and H. G. M., at the said office, in pursuance of the said last mentioned conspiracy, then and there falsely and deceitfully pretended that they were the agents of and for the said company, that the said company had then chartered certain ships to sail from London to a place beyond the seas, to wit, Australia, and that the said C. J. T. and H. G. M. then could, as such agents of and for the said company, lawfully contract for the carrying of passengers, and provide that passengers should be carried by the said ships chartered by the said company from London to Australia as aforesaid ; and the said C. J. T. and H. G. M., by means of the said false pretences and in further pursuance of the last mentioned conspiracy, did then and there unlawfully obtain from the said J. J. eleven pounds in money, of the moneys of the said J. J., and from the said J. G. nine pounds in money, of the moneys of the said J. G., and from the said T. B. thirty pounds in money, of the moneys of the said

T. B., with intent then and there to cheat and defraud the said J. J., J. G., and T. B. of their said moneys respectively; to the great damage of the said J. J., J. G., and T. B. respectively, to the evil example of all others in the like case offending, and against the peace, etc.

Third count.

That the said C. J. T. and H. G. M., on the day and year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, together with divers other evil disposed persons to the jurors aforesaid unknown, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together, by divers false pretences and subtle means and devices, to cause it to be believed that a certain company, called the "Australian Gold Mining and Emigration Company," had an office in the said city of London for the transaction of its business, and that the said C. J. T. was the agent of and for the said company; and that the said company had then chartered a certain ship, called the "Medicis," to sail from London to a place beyond the seas, to wit, Australia, and that the said C. J. T. then could, as such agent of and for the said company, contract for the carrying of passengers and provide that passengers should be carried by the said ship, called the "Medicis," from London to Australia aforesaid, and by means of the said belief to obtain from one J. G. a large sum of money, to wit, nine pounds in money, of the moneys of the said J. G., and to cheat and defraud him thereof; and in pursuance of the said last mentioned conspiracy, the said C. J. T. and H. G. M., on the day and year aforesaid, at the city aforesaid, and within the jurisdiction of the said court, did open an office in the said city of London, and did falsely pretend that it was the office of the said "Australian Gold Mining and Emigration Company," and that the said company had then chartered the said ship, called the "Medicis," to sail from London to a place beyond the seas, to wit, Australia, and that the said C. J. T. then could contract for the carrying of passengers, and provide that passengers should be carried by the said ship, called the "Medicis," from London to Australia aforesaid; by means of which said false pretences and in further pursuance of the said last mentioned conspiracy, the said C. J. T. and the said H.

G. M. did then and there unlawfully obtain from the said J. G. nine pounds in money, of the moneys of the said J. G., with intent then and there to cheat and defraud him thereof; to the great damage of the said J. G., to the evil example of all others in the like case offending, and against the peace, etc.

Fourth count.

That the said C. J. T. and the said H. G. M. afterwards, to wit, on the day and year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, together with divers other evil disposed persons to the jurors aforesaid unknown, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together, by divers false pretences and subtle means and devices, to cheat and defraud one J. G. of a large sum of money of the moneys of the said J. G., and that, in pursuance of the said last mentioned conspiracy, the said C. J. T. and H. G. M. afterwards, to wit, on the day and year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, did falsely pretend that a certain company, called the "Australian Gold Mining and Emigration Company," had then chartered a certain ship, called the "Medicis," to sail from London to a certain place beyond the seas, to wit, Port Philip, in Australia, and that the said C. J. T. and H. G. M. then could, on behalf of the said company, provide that one H. H. should be carried as a passenger on board the said ship from London to Port Philip aforesaid; by means of which said false pretences and in pursuance of the said last mentioned conspiracy, the said C. J. T. and H. G. M. did then and there unlawfully obtain from the said J. G. nine pounds in money, of the moneys of the said J. G., with intent then and there to cheat and defraud him thereof. Whereas, in truth and in fact, the said company had not then chartered the said ship, called the "Medicis," to sail from London to Port Philip aforesaid, nor could the said C. J. T. and H. G. M., or either of them, then on behalf of the said company or in any other right, provide that the said H. H. should be carried as a passenger on board the said ship from London to Port Philip as aforesaid; to the great damage of the said J. G., to the evil example of all others in like case offending, and against the peace, etc.

Fifth count.

That the said C. J. T. and H. G. M. afterwards, to wit, on the day and year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, together with divers other evil disposed persons to the jurors aforesaid unknown, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together, by divers false pretences and subtle means and devices, to cheat and defraud one J. G. of a large sum of money, of the moneys of the said J. G., and that, in pursuance of the said last mentioned conspiracy, the said C. J. T. afterwards, to wit, on the day and year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, did falsely pretend to the said J. G., that a certain company, called the "Australian Gold Mining and Emigration Company," had then chartered a certain ship, called the "Medicis," to sail from London to a certain place beyond the seas, to wit, Port Philip, in Australia, and that the said C. J. T. then could, on behalf of the said company, lawfully contract and agree that one H. H. should be carried as a passenger on board the said ship from London to Port Philip aforesaid; by means of which said false pretences, and in pursuance of the said last mentioned conspiracy, the said C. J. T. and H. G. M. did then and there unlawfully obtain from the said J. G. nine pounds in money, of the moneys of the said J. G., with intent then and there to cheat and defraud him thereof. Whereas, in truth and in fact, no company called the "Australian Gold and General Mining Company" had then chartered the said ship, called the "Medicis," to sail from London to Port Philip aforesaid, nor could the said C. J. T. then, on behalf of the said company or in any other right, contract or agree that the said H. H. should be carried as a passenger on board the said ship, from London to Port Philip aforesaid; to the great damage of the said J. G., to the evil example of all others in the like case offending, and against the peace, etc.

Sixth count.

That the said C. J. T. and H. G. M. afterwards, to wit, on the same day and year aforesaid, in the city aforesaid, and within the jurisdiction of the said court, together with the said divers

other evil disposed persons to the jurors aforesaid unknown, unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together, by divers false pretences and subtle means and devices, to obtain of and from one J. J. divers large sums of money, of the moneys of the said J. J., and then and there to cheat and defraud him thereof; to the great damage of the said J. J., to the evil example of all others in like case offending, and against the peace, etc.

(637) *For a conspiracy, by false representation, to induce a party to forego a claim.*(k)

That before the time of the committing of the offence hereinafter mentioned, to wit, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, one T. S. sold to W. B. a certain mare, at and for the price, to wit, of one hundred pounds, to be paid for the said mare by the said W. B. to the said T. S., which said price, at the time of the committing the offence hereinafter mentioned, was still due and unpaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. C., late of, etc., and the said W. B., late of, etc., then and there well knowing all and several the premises, but contriving and intending to cheat and defraud the said T. S., did, on the day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully conspire, contrive, confederate, and agree together by false and fraudulent representations to the said T. S., that the said mare was unsound of her wind, and that she had been examined by a veterinary surgeon, who had pronounced her a roarer; and that the said W. B. had sold her for seventy-five pounds, to induce and persuade the said T. S. to accept and receive from the said W. B. a much less sum of money in payment for the said mare than the said W. B. had agreed to pay the said T. S. for the same, and thereby then and there to cheat and defraud the said T. S. of a large sum, to wit, twenty-five pounds, of the price so agreed by the said W. B. to be paid to the said T. S. for the said mare; against the peace, etc.

(k) This count was held good in *R. v. Carlisle*, 25 Eng. Law & Eq. Rep. 577; 6 Cox C. C. 366. Wh. Cr. L. 8th ed. §§ 1347, 1348, 1349, 1359, 1385.

(638) *Conspiring to defraud the queen, by fraudulently removing goods subject to duties.*(l)

That the defendants, wickedly, etc., intending to cheat and defraud the queen, heretofore, to wit, on, etc., at, etc., “did unlaw-

(l) *R. v. Blake*, 6 Q. B. 126. Wh. Cr. L. 8th ed. §§ 1359, 1401. The second count charged the defendants with conspiring “by false and fraudulent representations and statements of and concerning the numbers, measures, weights, and values respectively, of certain foreign goods, wares, and merchandises, which had been and were theretofore imported and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the queen, according to the numbers, measures, weights, and values respectively, of the said foreign goods, wares, and merchandises respectively, to deprive and defraud our said lady the queen of a great part of the said duties of customs so due as aforesaid, in contempt,” etc.

The third count charged the defendants with having conspired, “by fraudulently and unlawfully omitting and neglecting to make and give a true, full, and correct declaration and description of the particulars of the numbers, measures, weights, and values respectively, of certain foreign goods, wares, and merchandises respectively, which had been and were theretofore imported and brought into the said port of London from parts beyond the seas, and in respect whereof certain duties of customs were then and there due and payable to our said lady the queen, according to the numbers, measures, weights, and values respectively, of the said foreign goods,” etc., “respectively, to deprive and defraud our said lady the queen of a great part of the said duties of customs so due as aforesaid, in contempt,” etc.

The fourth count described the conspiracy to be “to cheat and defraud our said lady the queen of divers large sums of money then being due and payable to our said lady the queen in respect of the duties of customs of this realm, in contempt,” etc.

Lord Denman, C. J.—“I do not feel the smallest doubt that this indictment is good. The charge is for conspiracy to procure imported goods, in respect of which duties are payable, to be delivered to the owners without payment. That is the substance of the first count; the fourth count is in effect the same, and may perhaps be liable to the same objection. I cannot think it necessary to specify the goods. It was a matter of evidence what the goods were to which the conspiracy related. The parties might have conspired without knowing what they were; they might have laid their heads together to cheat the queen of whatever customable goods they could pass. The case is not like that cited, of soliciting a custom-house officer to neglect his duty. There it was necessary to show that the party solicited was such an officer, that the duty was incumbent on him.”

Patteson, J.—“The first count shows the offence which is charged as clearly as can be done in a case of this kind. As to a future plea of *autrefois convict* or *autrefois acquit*, the identity of the offence must be a matter of evidence, in ninety-nine cases out of a hundred in the cases of charges of conspiracy.

“We know that a general count for a conspiracy to bring the house of commons into contempt would be good, though the means were not set forth; and, in such a case the identity of the offence, if the party were indicted again, must be made matter of evidence.”

Wightman, J., Coleridge, J., being absent.—“I am of the same opinion. In *R. v. Gill* (2 B. & Al. 204), the defendants were charged with conspiring, by divers false pretences and subtle means and devices, to obtain from A. and B.

fully and fraudulently conspire, combine, confederate, and agree together, and with divers other persons," etc., to "cause and procure certain goods, wares, and merchandises, which had been and were heretofore imported and brought into the port of London from parts beyond the seas, and in respect whereof certain duties and customs were then and there due and payable to our said lady the queen, to be taken and carried away from the said port, and to be delivered to the respective owners thereof without payment to our said lady the queen of a great part of the duties of customs so then and there due and payable thereon as aforesaid, with intent thereby then and there to defraud our said lady the queen in her said revenue of the customs; in contempt," etc.

(639) *Conspiracy to cast away a vessel, with intent to defraud the underwriters, at common law. First count, conspiracy to cast away, etc.(m)*

That A. B., late of, etc., yeoman, C. D., late of, etc., yeoman, E. F., late of, etc., yeoman, and G. H., late of, etc., yeoman, with other evil disposed persons to the inquest aforesaid unknown, on, etc., at, etc., with force and arms, etc., unlawfully, wickedly, designedly, falsely, and fraudulently did conspire, combine, confederate, and agree together to cast away, burn, and destroy on the high seas, and to cause and procure to be cast away, burnt, and destroyed on the high seas, a certain sloop or vessel called the "Norfolk," whereof one J. R. was then and there master, with an intent then and there to defraud the Delaware Insurance Company of Philadelphia (*naming the other companies*), to the

divers large sums of money, and to cheat and defraud them thereof; and it was held that the gist of the offence being the conspiracy, it was sufficient only to state the act and its object, and not necessary to set out the specific means. Mr. Cockburn's objection would apply to almost every case of conspiracy to defraud a party of goods. It is true that there might arise some difficulty on a plea of *autrefois acquit* or *autrefois convict*, from the want of particularity in the indictment. That, in most cases, must be supplied by parol evidence; it is very seldom that enough appears on the face of an indictment to enable a defendant to dispense with such proof."

"Rule for arresting judgment refused."

(m) *Com. v. Hollingsworth*, supreme court, Pennsylvania, November term, 1821, No. 30. This indictment was framed by eminent counsel, and contained, beside the counts in the text, several others charging conspiracies to defraud distinct insurance companies. The defendants were convicted at a *nisi prius* held by Tilghman, C. J., and a motion in arrest of judgment was overruled by the court in banc.

evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(640) *Second count. Conspiracy to defraud the underwriters, and as overt acts in pursuance thereof, loading a vessel with a sham cargo, exhibiting her to the underwriters, and fraudulently representing to them that the vessel contained specie, etc.*

That the said A. B., etc., with other evil disposed persons to the inquest aforesaid unknown, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., unlawfully, wickedly, designedly, falsely, and fraudulently did conspire, combine, confederate, and agree together to defraud the Delaware Insurance Company of Philadelphia (*naming all the other companies*). And the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said A. B., etc., with some evil disposed persons to the inquest aforesaid unknown, in pursuance of such conspiracy, combination, confederacy, and agreement as aforesaid, did then and there load and put on board, and cause and procure to be then and there loaded and put on board a certain sloop or vessel called the "Norfolk," whereof one J. R. was then and there master, certain boxes, to wit, sixty-one boxes, containing pig-iron, hay, and rubbish, and certain kegs, to wit, four kegs, containing lead and hay; and the jurors aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said A. B., etc., with other evil disposed persons to the inquest aforesaid unknown, in further pursuance of such conspiracy, combination, confederacy, and agreement as aforesaid, did then and there falsely and fraudulently exhibit and produce, and cause and procure to be then and there falsely and fraudulently exhibited and produced, to the Delaware Insurance Company of Philadelphia (*naming all the other companies*), false and fraudulent invoices and bills of lading, and did then and there falsely and fraudulently pretend and represent, and cause and procure it to be then and there falsely and fraudulently pretended and represented, to the Delaware Insurance Company of Philadelphia aforesaid (*naming all the other companies*), that the said boxes then and there contained true and genuine goods, wares, and merchandise, that the said kegs

then and there contained true and genuine specie, and that the said sloop or vessel called the "Norfolk" was then and there bound and intended to be sent and to depart on a voyage from Philadelphia to New Orleans; to the evil example, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(641) *Third count. Conspiracy to defraud the underwriters by falsely representing to them that a vessel loaded with a sham cargo was loaded with specie, and was the property of defendants.*

That the said A. B. *et al.*, with other evil disposed persons to the said inquest unknown, wickedly devising and intending fraudulently to get to themselves of and from the said Delaware Insurance Company of Philadelphia (*naming all the other companies*), large sums of money, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., did conspire, combine, confederate, and agree together falsely and fraudulently then and there to represent, and cause and procure to be then and there falsely and fraudulently represented, to the Delaware Insurance Company of Philadelphia (*naming all the other companies*), that they the said A. B., etc., were then and there severally the owners and proprietors of certain goods, wares, merchandise, and specie of great value and amount, that they the said A. B., etc., had then and there severally shipped, loaded, and put on board a certain sloop or vessel called the "Norfolk," whereof one J. R. was then and there master, the said goods, wares, and merchandise, and specie, that the said sloop or vessel called the "Norfolk" was then and there bound and intended to be sent and to depart on a voyage from Philadelphia to New Orleans, and that they the said A. B. *et al.* then and there severally desired to have and obtain insurance and policies of insurance underwritten upon the said goods, wares, merchandises, and specie, for the purpose of guarding against loss or damage from or by reason of storms or other casualties on the voyage aforesaid from Philadelphia to New Orleans; whereas, in truth and in fact, the said A. B. *et al.* had then and there loaded and put on board, and caused and procured to be then and there loaded and put on board, the said sloop "Norfolk," certain boxes, to wit,

sixty-one boxes, containing pig-iron, hay, and rubbish, and certain kegs, to wit, four kegs, containing lead and hay, with an intent, after having caused and procured policies of insurance on the said pretended goods, wares, merchandise, and specie, to be then and there underwritten, to burn and destroy the said sloop or vessel called the "Norfolk" on the high seas; to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(642) *Fourth count. Conspiracy to procure the insurance in a particular company, of certain boxes of hay as boxes of dry goods, and then afterwards to cause the vessel to be burned; and in pursuance of the conspiracy, as an overt act, inducing an agent of the underwriters to negotiate for them an insurance.*

That the said A. B. *et al.*, with other evil disposed persons to the inquest aforesaid unknown, wickedly devising and intending to get to themselves from the Delaware Insurance Company of Philadelphia a large sum of money, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., did conspire, combine, confederate, and agree together to cause and procure a policy of insurance to be then and there underwritten by the said Delaware Insurance Company of Philadelphia, in the sum of five thousand dollars, on certain boxes, to wit, on twenty-four boxes containing pig-iron and hay, under color and pretence that the said boxes then and there did contain dry goods and other true and genuine goods, wares, and merchandises, and after the said policy of insurance should be then and there so as aforesaid underwritten, to cause and procure the said boxes to be burnt and destroyed upon the high seas, with intent fraudulently and deceitfully to demand, recover, and receive from the said Delaware Insurance Company of Philadelphia the sum underwritten by them on the policy aforesaid. And in pursuance and prosecution of the said conspiracy, combination, confederacy, and agreement, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, the said E. F. falsely, deceitfully, designedly, and fraudulently did pretend and affirm to a certain N. B., and did cause and procure the said N. B. then and there untruly to

pretend and affirm to the said Delaware Insurance Company of Philadelphia, that he the said E. F. had then and there shipped and loaded in and on board a certain sloop or vessel called the "Norfolk," whereof one J. R. was then and there master, certain boxes of goods, wares, and merchandise, to wit, six boxes containing shoes and boots, eleven boxes containing cloths and other dry goods, and seven boxes containing drugs and medicines, altogether of great value, to wit, of the value of ten thousand eight hundred and eight dollars and one cent, and did then and there cause and procure the said N. B. then and there to request the said Delaware Insurance Company of Philadelphia then and there to underwrite a policy of insurance in the sum of five thousand dollars upon the said pretended goods, wares, and merchandise, in and on board the said sloop "Norfolk," from Philadelphia to New Orleans, and did then and there cause and procure the said N. B. then and there to produce and exhibit to the said Delaware Insurance Company of Philadelphia a certain false and pretended invoice of the said pretended goods, wares, and merchandise, so as aforesaid pretended to have been shipped and loaded in and upon the said sloop "Norfolk," and did then and there cause and procure the said Delaware Insurance Company of Philadelphia then and there to underwrite a policy of insurance in the sum of five thousand dollars, at the rate of two per centum from Philadelphia to New Orleans, upon the said pretended goods, wares, and merchandise, as and for true and genuine goods, wares, and merchandise, to wit, shoes and boots, cloths, and other dry goods, and drugs and medicines, according to the invoice as aforesaid, and as being of the value of ten thousand eight hundred and eight dollars and one cent; whereas, in truth and in fact, the boxes which the said E. F. so as aforesaid, and in pursuance of the conspiracy aforesaid, caused and procured to be insured as containing true and genuine goods, wares, and merchandise, then and there contained only pig-iron, hay, and rubbish, which they the said A. B., etc., then and there well knew, to the great deceit and damage of the said Delaware Insurance Company of Philadelphia, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

- (643) *For a conspiracy to defraud a railway company by travelling without a ticket on some portion of the line, obtaining a ticket at an intermediate station, and then delivering it up at the terminus, as if no greater distance had been travelled over by the passenger than from such intermediate station to the terminus.*(n)

That heretofore, and before and at the time of the committing of the offence hereinafter next mentioned, the London and North-western Railway Company used, worked, and employed a certain railway called the London and Northwestern Railway, for the purpose of conveying passengers and goods thereon for hire, part of which said railway runs from a certain railway station at Birmingham, in the county of Warwick, to a certain other railway station called the Willesden station, to wit, at Willesden, in the county of Middlesex, thence to a certain other railway station called the Camden station, to wit, at the parish of Saint Pancras, in the said county of Middlesex, and thence to a certain other railway station called the Euston station, to wit, at the parish last aforesaid, in the county last aforesaid. That at the time of the committing of the offence hereinafter next mentioned the said company were lawfully entitled to have, demand, and receive of and from every person conveyed by the said company as a third-class passenger over that part of the said railway which runs from the said station at Birmingham to the said Willesden station, the sum of and of and from every person conveyed as a third-class passenger over that part of the said railway which runs from the said Willesden station to the said Euston station, and no further or greater distance, the sum of That before and at the time of the committing of the offence hereinafter next mentioned, the said company, upon payment of the proper charges in that behalf, had been and were in the habit of granting to persons requiring to be conveyed by the said company, as passengers upon the said railway, certain tickets denoting the railway stations from and to which such persons respectively might require to be conveyed, which said tickets, when delivered up to the said

(n) 4 Cox C. C. Appendix, p. xxxviii.

company at the said stations denoted thereupon as the station to which such persons required to be conveyed, or at any other station between such last mentioned stations and the station from which such persons respectively required to be conveyed, were vouchers in favor of such persons delivering the same, and denoted and were accepted and received by the said company, in the absence of notice to the said company, as vouchers denoting that such persons had paid and discharged all the proper charges due to the said company in respect to their conveyance as passengers upon the said railway. That heretofore, and before and at the time of the committing of the offence hereinafter next mentioned, to wit, on the fourth day of January, in the year of our Lord one William Williams, at his own request and instance, had been conveyed by the said company as a third-class passenger over that part of the said railway which runs from the said station at Birmingham to the said Willesden station, whereupon the said William Williams then and there became and was justly and truly indebted to the said company in the said sum of and which said sum of the said company were then and there lawfully entitled to have, demand, and receive of and from the said William Williams, for and in respect of such his conveyance as aforesaid.

And that the said William Williams, late of the parish of Willesden, in the county of Middlesex, and within the jurisdiction of the said central criminal court, laborer, and William Brown, late of the same place, laborer, and divers others evil disposed persons, whose names to the jurors aforesaid are as yet unknown, wickedly devising and intending to cheat, deceive, injure, and defraud the said company in the premises, afterwards, to wit, on the day and year aforesaid, and whilst the said William Williams was so justly and truly indebted to the said company as aforesaid, and whilst the said company were so entitled to have, demand, and receive of and from the said William Williams the said sum of as aforesaid, in the parish of Willesden aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said central criminal court, unlawfully did conspire, combine, confederate, and agree together to purchase and procure of the said company, at the said Willesden station, for the sum of one of the said tickets,

so granted by them as aforesaid, denoting that the person to whom such ticket had been granted had required to be conveyed from the said Willesden station to the said Euston station, and no further or greater distance upon the said railway, and that all the proper moneys due to the said company, in respect of such last mentioned conveyance, had been paid and discharged. And afterwards, that the said William Williams and William Brown should travel together on the said railway from the said Willesden station to the Camden station, and thence to the said Euston station, the said Camden station being a railway station between the said Willesden station and the said Euston station, and should at the said Camden station fraudulently and deceitfully produce such ticket to the said company and their servants as a ticket granted to the said William Williams at the commencement of his journey upon the said railway, as a voucher that the said William Williams had paid and discharged all the proper charges due to the said company in respect of the conveyance of the said William Williams upon the said railway, and as well by means of the said ticket as by divers false pretences, unlawfully, deceitfully, and fraudulently to cause it falsely to appear to the said company that the said William Williams had not been conveyed as a passenger any greater or other distance upon the said railway than from the Willesden station aforesaid to the said Camden station ; and that the said William Williams had paid to the said company all the proper charges for his conveyance as a passenger upon the said railway, and fraudulently and deceitfully to induce and persuade the said company and their servants to accept and receive the said ticket in satisfaction and discharge of all and every the charges to which the said William Williams was then and there liable, in respect of such his conveyance as aforesaid, and as a voucher to the effect that such charges had been fully paid and satisfied to the said company by the said William Williams, and in manner aforesaid to deceive, injure, and prejudice the said company, and to defraud the said company of the said sum of in which the said William Williams was so indebted as aforesaid, and mutually to aid and assist one another in perfecting and putting in execution the said unlawful and wicked conspiracy, combination, confederation, and agreement. That the said Wil-

liam Williams and William Brown, in fraudulent collusion with the said other evil disposed persons, in prosecution and pursuance of the said wicked and unlawful combination, conspiracy, confederacy, and agreement, did, on the fourth day of January, in the year of our Lord and whilst the said William Williams was indebted as aforesaid, purchase and procure of the said company, at the said Willesden station, for the sum of

a certain ticket, denoting that the person to whom such ticket had been granted had required to be conveyed from the said Willesden station to the said Euston station, and no further or greater distance on the said railway, and had paid all the proper charges for such conveyances, and afterwards did travel again on the said railway to the said Camden station, being a railway station between the said Willesden station and the said Euston station, and there, at the said Camden station, did produce and deliver the said ticket to one William Ludlow Penson, then and there being a servant of the said company, as a ticket granted to the said William Williams at the commencement of his journey as a passenger on the said railway, and unlawfully, fraudulently, deceitfully, and injuriously offer the said ticket to the said William Ludlow Penson as a voucher, to the effect that all the charges lawfully to be made by the said company upon the said William Williams, in respect of his conveyance upon the said railway, had been paid and discharged by the said William Williams, and did thereby then and there endeavor to cheat and defraud the said company of the said sum of so due to them from the said William Williams for such conveyance of the said William Williams to the said Willesden station as aforesaid, to the great injury and deception of the said company, to the evil example, etc., and against the peace, etc.

Second count.

That heretofore, and before and at the time of the committing of the offence hereinafter next mentioned, the said William Williams was justly and truly indebted to the said London and Northwestern Railway Company in the sum of for the conveyance of the said William Williams as a passenger on a certain part of the said London and Northwestern Railway, that is to say, from Birmingham, in the county of

Warwick, to Willesden, in the said county of Middlesex. That the said William Williams and William Brown, afterwards, to wit, on the day and year aforesaid, being possessed of a certain ticket of no value to the said company, granted by the said company, and denoting that the person having possession thereof was entitled to be conveyed by the said company on a certain other part of the said railway, that is to say, from Willesden aforesaid to the said railway station called the Camden station, and thence to the said station called the Euston station, free of all charge for and in respect of such conveyance; afterwards, to wit, on the day and year aforesaid, and whilst the said William Williams was so justly and truly indebted as last aforesaid, at the parish of Saint Pancras aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said central criminal court, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers other evil disposed persons, whose names to the jurors aforesaid are as yet unknown, unlawfully, knowingly, fraudulently, and deceitfully falsely to pretend and to cause it falsely to appear to the said company and their servants, that the said William Williams had been conveyed by the said company no further or other distance on the said railway than from Willesden aforesaid to the said station called the Camden station, and that the said William Williams was not indebted to the said railway company, or liable to pay them any sum of money for his conveyance upon the said railway, and by the false pretences and appearances in this count aforesaid, to induce and persuade the said company and their said servants to accept and receive the said ticket in this count mentioned, as a voucher to the effect that all claims, charges, and demands of the said company on the said William Williams, in respect of such conveyance as a passenger on the said railway, had been fully paid and discharged, and for and in full satisfaction of all claims, charges, and demands whatsoever of the said company upon the said William Williams, for his conveyance as a passenger on the said railway, and thereby unlawfully, wrongfully, unjustly, and fraudulently to enable the said William Williams to avoid, escape, evade, and elude, and with intent then and there that the said William Williams should thereby unlawfully, wrongfully, injuriously, and fraudu-

lently avoid, escape, evade, and elude the payment of the said sum of so due to the said company as in this count aforesaid, and to hurt, injure, deceive, prejudice, and defraud the said company in manner in this count mentioned; to the great injury, etc., and against the peace, etc.

Third count.

That heretofore, and before and at the time of the committing of the offence hereinafter next mentioned, the said William Williams was indebted to the said London and Northwestern Railway Company in a certain sum of money, to wit, the sum of and that the said William Williams and William Brown, being evil disposed persons, afterwards, to wit, on the day and year aforesaid, at the parish of Willesden aforesaid, in the county of Middlesex aforesaid, and within the jurisdiction of the said central criminal court, unlawfully and wickedly did conspire, combine, confederate, and agree together, and with divers other evil disposed persons, whose names to the jurors aforesaid are as yet unknown, by divers false pretences, and by divers crafty, indirect, false, fraudulent, and deceitful acts, ways, means, devices, stratagems, and contrivances, to enable the said William Williams to avoid, escape, evade, elude, and withhold the payment of the said sum of to the said company, and to cheat, defraud, and altogether deprive the said company of the said debt in this count mentioned, and of all profit, benefit, and advantage to the said company arising and to arise from the same; to the great injury and deception of the said company, to the evil and pernicious example, etc., and against the peace, etc.

(643a) *Conspiracy to defraud railroad company by fraudulently filling and uttering blank passes. First count.*

The jurors of the state of Maryland, for the body of the city of Baltimore, do on their oath present, that heretofore, and before and at the time of the committing of the offence hereinafter next mentioned, the Chicago, Burlington, and Quincy Railroad Company was a corporation duly created and existing under and in accordance with the laws of the state of Illinois, and used, worked, and employed a certain railway, and made

and had connections of travel and transportation, and certain leasehold rights of way with and over and upon the lines of railway of divers other railway corporations, to wit, in the said state of Illinois and elsewhere, for the purpose of carrying and conveying passengers and articles of commerce thereon; that at the time of committing the offence hereinafter next mentioned, the said Chicago, Burlington, and Quincy Railroad Company was lawfully entitled to and did from time to time issue and grant to divers persons, certain cards, tickets, or tokens, entitling the person or persons named thereon to pass free of charge over the line of railway of said company and such other lines in and over which it had and exercised proper control, or parts or portions thereof, upon the railway cars of said company, and which said cards, tickets, or tokens were known and designated as "annual passes," and were, when properly authorized, granted, and issued by the said Chicago, Burlington, and Quincy Railroad Company, good and available to such person or persons named thereon as aforesaid, for the purpose of such free passage as aforesaid, for and during the entire year in which they and each of them were so as aforesaid issued and granted; but said annual passes as aforesaid were not good or available for the purpose of such free passage as aforesaid, over any of the lines of railway aforesaid, or any part or portion thereof, to any other person or persons save and except the person or persons duly named thereon, and whose name or names were therein inserted by the proper authority and direction of said company, and unless the same had been duly issued, delivered, and granted to said person or persons whose name or names as aforesaid thereon duly appeared by the like proper authority and direction of said Chicago, Burlington, and Quincy Railroad Company, or by some officer thereof, duly empowered to give such authority and direction as aforesaid; that before the time of the committing of the offence hereinafter next mentioned, Upton W. Dorsey, of the city of Baltimore aforesaid, yeoman, and William E. Bloomer, of the same place, yeoman, and each of them, at the city of Baltimore aforesaid, to wit, on the first day of January, in the year of our Lord eighteen hundred and seventy-seven, unlawfully and wrongfully became possessed of certain of such cards, tickets, or tokens as aforesaid, upon which no name or

names of any person or persons had been written, and which had never theretofore been issued or granted to any person or persons, as vouchers entitling him or them to such free passages as aforesaid, either by the said Chicago, Burlington, and Quincy Railroad Company, or by any officer thereof, duly empowered and authorized to grant and issue the same, but which said cards, tickets, or tokens so as aforesaid in the unlawful and wrongful possession of said Upton W. Dorsey and the said William E. Bloomer, had and contained blank spaces left for the filling in or writing the name or names of the person or persons to whom the same might have been properly and duly granted and issued by the said Chicago, Burlington, and Quincy Railroad Company, or some officer thereof, duly empowered and authorized to fill in and write such name or names, and to grant and duly issue the same. Thereupon the said Upton W. Dorsey and the said William E. Bloomer, being persons of evil minds and dispositions, together with divers other evil disposed persons, whose names are to the jurors aforesaid unknown, to wit, at the city and within the jurisdiction aforesaid, did unlawfully, fraudulently, and wickedly conspire, combine, confederate, and agree together, between and amongst themselves, to fraudulently and wrongfully fill in and insert, and caused to be filled in and inserted in and upon such cards, tickets, or tokens aforesaid, so as aforesaid wrongfully in their and each of their possession, and in the blank spaces thereupon as aforesaid, the names of divers persons for the purpose and with the intent of unlawfully selling and disposing of the same, to their own wicked and unlawful gain and advantage, to such person or persons whose name or names were by the said Upton W. Dorsey and the said William E. Bloomer, and each of them, so as aforesaid wrongfully filled in and inserted by them and each of them, or caused to be filled in and inserted therein by them and each of them, and with the further intent and purpose that such person or persons last aforesaid should use the same upon the railway cars of the said Chicago, Burlington, and Quincy Railroad Company, upon the lines of railway aforesaid, as voucher of their assumed and pretended right to passage and transportation thereupon without charge, to the manifest injury, damage, and loss of the said Chicago, Burlington, and Quincy

Railroad Company; that in pursuance of such conspiracy, combination, confederation, and agreement as aforesaid, the said Upton W. Dorsey and the said William E. Bloomer, and each of them, did fill in, write, and insert in and upon a large number of such cards, tickets, or tokens aforesaid, so as aforesaid in their and each of their wrongful and unlawful possession and custody, and cause to be filled in, written, and inserted in and upon the same, the name or names of divers persons, with the intent and purpose aforesaid, and did wrongfully and unlawfully sell and dispose of the same, or cause the same to be sold or disposed of to such persons as aforesaid, in order that the same might be by such persons used as vouchers of their pretended and assumed right to passage and transportation free of charge, upon the railway cars of the said Chicago, Burlington, and Quincy Railroad Company, upon the lines of railway aforesaid, and with the intent to cheat and defraud the said company of their monies, property, and lawful gains, to the great damage, injury, and pecuniary loss of the said Chicago, Burlington, and Quincy Railroad Company, and to their and each of their own wicked gain and advantage, to wit, at the city of Baltimore aforesaid; by means whereof, the said Chicago, Burlington, and Quincy Railroad Company was cheated and defrauded of their monies, property, and lawful gains, by the said Upton W. Dorsey and the said William E. Bloomer, and each of them, to wit, at the city of Baltimore aforesaid, and within the jurisdiction aforesaid, to a large amount, to wit, to the amount and value of two hundred thousand dollars, to the evil example of all others in the like case offending, and against the peace, government, and dignity of the state.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of the committing of the offence hereinafter next mentioned, the Chicago, Burlington, and Quincy Railroad Company, being such a corporation as aforesaid, had been in the habit from time to time of lawfully granting and issuing to divers persons, certain cards, tickets, tokens, or vouchers, entitling such person or persons whose name or names was or were thereupon duly written, by

authority of the said the Chicago, Burlington, and Quincy Railroad Company, or by some one of its officers duly empowered so to do, to ride upon the railway cars of said company, and over the lines of railway aforesaid, free of charge, for and during the entire year in which such cards, tickets, tokens, or vouchers were issued, upon exhibiting or presenting the same for examination to the agent or employé of said company, whose proper duty and employment it was to examine the same and to pass such person or persons named thereon as aforesaid, free of charge; that the said Upton W. Dorsey and the said William E. Bloomer, and each of them, well knowing the premises, and being persons of evil minds and dispositions, together with divers other persons, whose names are to the jurors aforesaid unknown, did unlawfully, fraudulently, and wickedly conspire, combine, confederate, and agree together, between and amongst themselves, to cheat and defraud the said the Chicago, Burlington, and Quincy Railroad Company of its monies, property, and lawful gains, by fraudulently and wrongfully procuring and becoming possessed of a large number of such cards, tickets, tokens, or vouchers aforesaid, in and upon which the name or names of no person or persons had been written and inserted, and which had not been as aforesaid duly issued and granted by the said the Chicago, Burlington, and Quincy Railroad Company, or by any officer thereof, duly empowered so to do, and without which due and authoritative writing and insertion of the name or names of some person or persons to whom the same had been as aforesaid duly granted and issued, such cards, tickets, tokens, or vouchers were not of any proper or legal avail for the purpose of the issuing or granting of the same, with the intent fraudulently and wrongfully to cause the same to have inserted in and upon them and each of them, in certain blank spaces left therefor, the names of divers persons, in order that the said Upton W. Dorsey and the said William E. Bloomer, and each of them, might for their own wicked gain and advantage, sell and dispose of the same to the person or persons whose name or names should be therein wrongfully and unlawfully inserted, and that such person or persons might thereupon present the same upon the railway cars of the said Chicago, Burlington, and Quincy Railroad Company, and upon

the lines of railway aforesaid, as the pretended and assumed vouchers of their right to free passage and transportation thereupon, to the manifest damage and loss of said Chicago, Burlington, and Quincy Railroad Company; that in pursuance of said conspiracy, combination, confederation, and agreement, the said Upton W. Dorsey and the said William E. Bloomer, and each of them, did become possessed of a large number of such cards, tickets, tokens, or vouchers aforesaid, which said cards, tickets, tokens, or vouchers had not been filled in or written with the name or names of any person or persons as aforesaid, had not theretofore at any time been duly issued or granted to any person or persons by the said Chicago, Burlington, and Quincy Railroad Company, or by any officer thereof, empowered so to do; and the said Upton W. Dorsey, and the said William E. Bloomer, and each of them, did thereupon insert and write, or cause to be inserted or written in such blank spaces as aforesaid, the names of divers persons, and did sell and dispose of the same to such divers persons whose names were therein written, or did sell and dispose of the same with such blank spaces unfilled, and without the name or names of any person being therein inserted or written, but with the intent and purpose that such cards, tickets, tokens, or vouchers should be thereafter fraudulently filled up and written with the names of divers persons, and in order that the same might be used as pretended or assumed vouchers, for the free passage and transportation of such persons as aforesaid, upon the railway cars and over the railway lines aforesaid, and with intent to cheat and defraud the said Chicago, Burlington, and Quincy Railroad Company as aforesaid, of its monies, property, and lawful gains, to wit, at the city of Baltimore aforesaid; by means whereof, the said Chicago, Burlington, and Quincy Railroad Company was cheated and defrauded by the said Upton W. Dorsey and the said William E. Bloomer, and each of them, to wit, at the city of Baltimore aforesaid, and within the jurisdiction aforesaid, of its monies, property, and lawful gains, to a large amount, to wit, the amount of two thousand dollars, to the evil example of all others in the like case offending, and against the peace, government, and dignity of the state.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said Upton W. Dorsey and the said William E. Bloomer, being evil disposed persons and seeking to get their living by various subtle, fraudulent, and dishonest practices, on the said first day of January, in the year of our Lord eighteen hundred and seventy-seven, with force and arms, at the city of Baltimore aforesaid, together with divers other evil disposed persons, unlawfully, fraudulently, and deceitfully did combine, conspire, confederate, and agree together, by divers false pretences and subtle means and devices, to obtain and acquire to themselves of and from the Chicago, Burlington, and Quincy Railroad Company or corporation, duly created and existing under and in accordance with the laws of the state of Illinois, divers large quantities of property, to wit, divers large quantities of cards, tickets, or tokens, called "annual passes," of great value, to wit, of the value of two thousand dollars, of the cards, tickets, or tokens, and property of the said Chicago, Burlington, and Quincy Railroad Company, so incorporated as aforesaid, and to cheat and defraud it thereof, to the great damage of the said Chicago, Burlington, and Quincy Railroad Company as aforesaid, to the evil example of all others in the like case offending, and against the peace, government, and dignity of the state.

A. LEO KNOTT,

The state's attorney for the city of Baltimore.(v)

(644) *Against A., B., C., and D. for a conspiracy to rise upon a vessel and carry her to a port occupied by an enemy, with an overt act; and against E. for comforting and abetting them, etc.*(w)

That J. B., otherwise called M. M., R. D., A. D., A. S., and C. E., all late of, etc., yeomen, on, etc., at, etc., unlawfully, secretly, and wickedly did consult, combine, conspire, and agree together, that they and each of them should go, enter, and hire themselves on board a certain sloop or vessel, whereof was

(v) The above indictment was sustained in *Bloomer v. State*, 48 Md. 521. See Wh. Cr. L. 8th ed. §§ 1349, 1372, 1397, 1400.

(w) Drawn by Mr. Bradford when attorney-general of Pennsylvania.

the master and commander, the said sloop or vessel then lying in the river Delaware, near the shores of this commonwealth, and belonging to some subject or subjects of this state (to the jurors aforesaid unknown), under pretence of serving as seamen on board the said vessel and of faithfully navigating the same, according to the directions of the said and that they, afterwards, to wit, as soon as the said vessel should come and arrive on the open seas and main ocean, should then and there feloniously and piratically make a revolt in the said sloop or vessel, and then and there should rise upon, conquer, and subdue the said or whoever should be master thereof, and the faithful mariners on board the said vessel, and then and there should take, navigate, and run away with the said sloop or vessel, her tackle, apparel, furniture, and cargo to the city and port of New York, then and yet being in the possession and under the power of the king of Great Britain, the open enemy of this state. And the inquest aforesaid, etc., do further present, that the said J. B., otherwise called M. M., and, etc., in order to effectuate such their wicked and unlawful conspiracy aforesaid, on the day and year aforesaid, at the county aforesaid, did go, enter, and hire themselves on board the said sloop or vessel, under the pretences aforesaid, and with the intentions and designs aforesaid, contrary to the form of the act of assembly in such case made and provided, to the evil example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

That S. F., late of, etc., in the county aforesaid, widow, not being ignorant of the premises, but well knowing the same, on the day and year aforesaid, at the county aforesaid, the said J. B., otherwise called, etc., unlawfully and wickedly did receive, harbor, and abet, maintain, and comfort, and then and there, for the maintaining and comforting of the said J. B., otherwise called, etc., meat and drink to him then and there did give and deliver, and cause to be given and delivered, and then and there the said J. B., otherwise called, etc., did secrete, harbor, and conceal, with intent the due course of justice in this behalf to obstruct and prevent, she, the said S. F., then and there well knowing the said J. B., etc., so as aforesaid to have combined, conspired, and agreed with the malefactors aforesaid, etc.

(645) *Conspiracy to disturb a party in the possession of his lands, and to deprive him of them.*(x)

That J. S. C., J. R. M., R. S. C., and divers other persons, to the jurors aforesaid as yet unknown, being persons of evil minds and dispositions, on, etc., with force and arms, at, etc., unlawfully and wickedly did conspire, combine, confederate, and agree together unlawfully and unjustly to disturb, molest, and disquiet G. J. in the peaceable and quiet possession, occupation, and enjoyment of certain manors, messuages, lands, and hereditaments and premises, situate and being in the said county of J., of which he, the said G. J., then was and for a long time had been peaceably and quietly possessed; and also to deprive him of certain issues and profits arising, issuing, and accruing therefrom, and of the rents, issues, and profits of certain other lands, messuages, and premises, situate and being in the said county, whereof certain persons then were in peaceable and quiet possession, as tenants of the said G. J., by unlawful means and devices. And the jurors, etc., that the said J. S. C., in pursuance of the said unlawful and wicked conspiracy, combination, confederacy, and agreement, and for carrying the same into effect, did afterwards, to wit, on, etc., with force and arms, at, etc., break and enter a certain messuage, called Stafford castle, situate in the county aforesaid, whereof the said G. J. had long been and then was in the peaceable and quiet possession. And the jurors, etc., that J. S. C., on, etc., at, etc., did falsely, fraudulently, and wilfully affirm to W. H. C. and divers other persons, that he, the said J. S. C. had been appointed agent to the said R. S. C. his brother, by the house of peers; whereas, in truth, etc., he had not been appointed agent to the said R. S. C. by the house of peers, as he, the said J. S. C., then and there well knew. And the jurors, etc., that in further pursuance, etc., said J. R. M., on, etc., at, etc., did unlawfully pretend and assume to hold a court leet and court baron of the manor of F., in the said county, as the steward thereof to R. S. C., whom he had then and there represented to be lord of the said manor, the said G. J. then

(x) Dickinson's Q. S. 6th ed. 355. Found at Stafford summer assizes, 1823. Removed into K. B. See *R. v. Cooke*, 2 B. & C. 618; 5 Ib. 538; 4 D. & R. 114; 7 Ib. 673.

being in the peaceful occupation of the said manor, as J. R. M. then and there well knew, to the great damage of said G. J., etc., and *contra pacem*.

Second count. The same, without overt acts.

Third count. To cut down timber trees.

That defendants and ten other persons, on, etc., with force and arms, at, etc., did conspire, etc., to cause and procure a large number of timber trees growing and being in certain lands situate in the said county of S., and then and long before in the peaceable possession of certain tenants of the said G. J., and the same then being the property of the said G. J., unlawfully and against the will of the said G. J. to be cut down, felled, and prostrated, and to get the same into their possession, and convert and dispose of the timber thereof to their own use. And the jurors, etc., that J. S. C., on, etc., at, etc., did obtain and procure divers laborers to cut down, fell, and prostrate divers of the said trees, and the said laborers did accordingly then and there, by his directions, with force and arms, unlawfully and violently break and enter divers, to wit, twenty, closes wherein the said trees were growing and being as aforesaid, and unlawfully cut down, fell, and prostrate divers, to wit, one hundred, of the said trees, and did take and carry away the same, to the great damage, etc.

Fourth count. The same, without overt acts.

(646) *Fifth count. To cheat tenants of rent, by a false claim as landlord.*

Did conspire, etc., unlawfully and wickedly to cheat, defraud, and impoverish M. R., W. R., J. D., and divers other persons, who then and there lawfully held and enjoyed divers messuages, lands, and tenements, situate and being in the county aforesaid, as tenants thereof to the said G. J., and unlawfully and fraudulently to obtain from them divers large sums of money, by causing to be believed by the said tenants, that the said R. S. C. had a claim of title to the said messuages, lands, and tenements, which was admitted, received, and allowed by the said G. J., the landlord of

the said tenements, to be good and valid; whereas, in truth and in fact, they the said (defendants) then and there well knew that the said R. S. C. had not a claim of title to the said messuages, lands, and tenements, or any of them, admitted, received, or allowed by the said G. J. to be good and valid. And the jurors, etc., that the said J. S. C., on, etc., at, etc., did falsely, fraudulently, and wilfully misrepresent to the said J. D., then being a tenant of the said G. J. of certain of the said messuages, lands, and tenements, and then owing certain rent in respect of the same; and to J. R., the son of the said W. R., who then held certain moneys of his father, who was then tenant of certain of the said messuages, etc., of the said G. J., and then and there owed rent for the same, that he the said J. S. C. then had in his possession a letter of the said G. J., recognizing the justice of the claim of the said R. S. C. to the said messuages, etc.; whereas, in truth and in fact, the said J. S. C. had not in his possession a letter, etc. (*repeating as above*), as he the said J. S. C. then well knew, and thereby he the said J. S. C. did falsely and fraudulently then and there receive and obtain from the said J. D. a large sum of money, to wit, the sum of pounds, of his moneys; and from the said J. R. a large sum of his moneys, to wit, the sum of pounds, of the moneys of his said father, W. R. And the jurors, etc., that the said J. S. C., on, etc., at, etc., did offer to M. P., then being tenant of the said G. J. of certain messuages, etc., to obtain for her a lease of the premises of which she was then so tenant from the said R. S. C.; and thereupon he the said J. S. C. then and there, in pursuance of the said last mentioned conspiracy, combination, confederacy, and agreement, falsely and fraudulently asserted to the said M. P., that the said G. J. had given up all title to the estate whereof the said premises held by the said M. P. were parcel; and also that he the said J. S. C. had a letter from the said G. J., to prove that he had so given up title to the said estate; whereas, in truth and in fact, the said G. J. had not given up all title to the said estate, as he the said J. S. C. well knew; and whereas, in truth and in fact, the said J. S. C. had not a letter from the said G. J., to prove that he had given up such title, to the evil example, etc.

Sixth count. Same as fifth, but without overt act.

(647) *Seventh count. To molest tenants by distresses, etc.*

Did conspire, etc., by unlawful and vexatious distresses and threats of the power of the said R. S. C., under the title of Lord S., to molest, disturb, and disquiet divers persons, who then and there lawfully held and enjoyed divers messuages, lands, etc., situate in the said county, as tenants thereof to the said G. J. (overt act by J. S. C., that he "did unlawfully and fraudulently issue and sign, as agent to the said R. S. C., by the title of Lord S., a certain warrant of distress for rent on the premises occupied by one P. S., a parcel of the messuages, etc., last aforesaid, as tenant thereof to the said G. J., under and by color whereof the goods of the said P. S. on the said premises, being of great value, to wit, etc., were afterwards, to wit, on, etc., at, etc., taken and seized as for and in the name of a distress for rent pretended to be due to the said R. S. C., under the title of Lord S., for the said premises"); to the evil example, etc.

Eighth count. Similar, without overt acts.

(648) *Conspiracy to obtain goods upon credit, and then to abscond and defraud the vendor thereof.(y)*

That A. B., C. D., and E. F., all of, etc., in the county aforesaid, traders, wickedly and unjustly devising and intending one G. H. to defraud and cheat of his goods, property, and merchandises, on, etc., at, etc., did falsely and fraudulently conspire, combine, confederate, and agree among themselves to obtain and get into their hands and possession, of and from the said G. H., his goods, property, and merchandises upon trust and credit, and then to abscond out of the said commonwealth, and defraud him thereof; and that the said A. B., C. D., and E. F., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had, did then and there falsely and fraudulently obtain and get into their hands and

(y) *Com. v. Ward*, 1 Mass. R. 473. The overt acts in the text may be omitted, which were treated by the court in their judgment as surplusage. See *supra*, 607, 608, note, as to indictments for conspiracy to commit the statutory offence of secreting goods, etc.

possession, of and from the said G. H., goods, wares, and merchandises of the value of five hundred dollars, upon trust and credit; and in further pursuance of the conspiracy, combination, and confederacy aforesaid, so as aforesaid had among themselves, they the said A. B., C. D., and E. F., before the time of payment for the said goods, property, and merchandises had arrived, did abscond and go out of the said commonwealth, and did then and there, in manner aforesaid, cheat and defraud the said G. H. of his goods, property, and merchandise aforesaid. (*Conclude as in book 1, chapter 3.*)

(649) *Conspiracy to defraud an illiterate person, by falsely reading to him a deed of bargain and sale, as and for a bond of indemnity.*(z)

That A. B., C. D., and E. F., all of, etc., in the county aforesaid, yeoman, unlawfully devising and intending one G. H. to injure, deceive, and defraud, and him the said G. H. fraudulently to deprive of his property and estate, on, etc., at, etc., did unlawfully conspire, combine, confederate, and agree among themselves falsely and fraudulently to obtain from the said G. H. a deed of bargain and sale of a certain lot of land in said town of B., called lot No. 20 in said town of B., and that in pursuance of, and according to the conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had, they the said A. B., C. D., and E. F. did falsely and fraudulently prepare, make out, and fabricate a deed of bargain and sale of the said lot of land, to be signed and executed by him the said G. H., and did then and there falsely and fraudulently present the same to him the said G. H., and did then and there falsely and fraudulently, and in pursuance of the conspiracy, combination, confederacy, and agreement aforesaid, read the same to him the said G. H. as a bond and obligation for the sum of seventy dollars, to be given by him the said G. H. to one I. J., as a consideration that he the said G. H. should indemnify the said I. J. against the payment

(z) "This precedent (says Mr. Davis, Prec. p. 103) contains the substance of an indictment tried in the supreme court of Massachusetts for the county of Kennebec. The original indictment stated the manner in which this fraud was carried into effect; but it is not retained in this precedent, it being unnecessary." A similar attempt at an early period was held indictable. *R. v. Skirrett*, 1 Sid. 312. See Wh. Cr. L. 8th ed. § 671.

of certain notes of hand which he the said G. H. had, before the day aforesaid, made and given to one K. L.; he the said G. H. being then and there an illiterate person, and by reason thereof wholly unable to read the deed, so as aforesaid falsely and fraudulently made out and presented to him, etc.

(650) *Conspiracy to induce a person of unsound mind to sign a paper authorizing the defendants to take possession of his goods.*(a)

That E. C., late, etc., J. C., late, etc., and S. his wife, J. S., late, etc., W. K., late, etc., and C. C., late, etc., on the twentieth day of November, in the year of our Lord with force and arms, at the parish of Barnes, in the county of Surrey, and within the jurisdiction of the central criminal court, unlawfully and wickedly and maliciously did conspire, combine, confederate, and agree together to defraud one J. R. of certain cattle, goods, and chattels, of great value, to wit, of the value of one hundred pounds, and then and there to obtain and acquire the same to themselves. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. C., J. C. the elder, and S. his wife, J. C. the younger, J. S., W. K., and C. C., otherwise called C. F., in pursuance of the said conspiracy, did, on the day and year aforesaid, at the parish and county aforesaid, and within the jurisdiction of the said court, fraudulently induce and procure the said J. R. to sign a paper writing, purporting to authorize them to take possession of and sell the said cattle, goods, and chattels, the said J. R. then and there being of unsound mind, and weak and diseased in body, and wholly incapable of understanding, and not understanding the meaning and effect of said paper writing. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. C., J. C. the elder, and S. his wife, J. C. the younger, J. S., W. K., and C. C., otherwise called C. F., in further pursuance of the said conspiracy, did, on the day and year aforesaid, and within the jurisdiction of the said court, with force and arms, at, etc., and under color and pretence of the said paper writing, so signed by the said J. R. as aforesaid, seize and take possession of divers cattle, goods, and chattels, to wit, one horse, one cart, five chairs,

(a) 1 Cox, C. C. App. p. xxvii.

five tables, of the said J. R., of great value, to wit, of the value of one hundred pounds, and did then and there carry away, sell, dispose of, and convert the same to their own use; to the great damage of the said J. R., to the evil example of all others, and against the peace, etc.

Second count. Injuring in business.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. C., and J. C. the elder, and S. his wife, J. C. the younger, J. S., W. K., and C. C., otherwise called C. F., contriving to injure the said J. R., and, as much as in them lay, unlawfully to ruin him in his trade and business of a laundress which he then and there used, exercised, and carried on, and to prevent and hinder him from using, exercising, and carrying on the said trade and business in as full, ample, and beneficial a manner as he was used and accustomed to do, on the twentieth day of November, in the year of our Lord at the parish aforesaid, in the county aforesaid, and within the jurisdiction of the said central criminal court, unlawfully, wickedly, and maliciously did conspire, combine, confederate, and agree together, with divers indirect, subtle, and fraudulent means and devices, to injure, oppress, and impoverish the said J. R. and wholly to prevent and hinder him from using, exercising, and carrying on his said trade and business of a laundress; to the great damage of the said J. R., to the evil example of all others in the like case offending, and against the peace, etc.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said E. C., J. C. the elder, and S. his wife, J. C. the younger, J. S., W. K., and C. C., otherwise called C. F., on the day and year last aforesaid, at the parish and county aforesaid, and within the jurisdiction of the central criminal court, with force and arms, at, etc., unlawfully, wickedly, and maliciously did again conspire, combine, confederate, and agree together, by divers indirect, subtle, and fraudulent means and devices, to injure, oppress, impoverish, and wholly ruin J. R., and wholly to prevent and hinder him from carrying on his trade and business of a laundress, which he then and there exercised

and carried on ; to the great damage of the said J. R., to the evil and pernicious example of all others in the like case offending, and against the peace, etc.

(650a) *Conspiracy to abduct a child.*

(This is the third count of the indictment for the abduction of Charlie Ross, of which the first count is given supra, 203a.)

That on the said first day of July, in the year of our Lord one thousand eight hundred and seventy-four, at the county aforesaid, and within the jurisdiction of this court, William Westervelt, late of the said county, yeoman, and Mary Westervelt, late of the said county, matron, and William Mosher, late of the said county, yeoman, alias William Henderson, and Joseph Douglass, late of the said county, yeoman, alias Joseph Clark, together with divers other evil disposed persons, the names of the said other evil disposed persons being to this grand inquest as yet unknown, did unlawfully, falsely, fraudulently, wilfully, and maliciously combine, confederate, conspire, and agree together, then and there unlawfully, fraudulently, wilfully, and maliciously to decoy, entice, lead, take, and carry the said Charles Brewster Ross away and out of and from the lawful charge, care, guardianship, and possession of the said Christian K. Ross and Sarah Ann Ross, he the said Charles Brewster Ross, then and there being a minor child under the age of six years, and they the said Christian K. Ross and Sarah Ann Ross, then and there being the lawful parents and guardians of the said Charles Brewster Ross, and then and there having the lawful charge, care, and possession of the said Charles Brewster Ross as aforesaid, and then and there the said Charles Brewster Ross from his said parents and guardians unlawfully, fraudulently, wilfully, and maliciously for a long space of time to conceal and detain, and thereby then and there for a long space of time unlawfully, fraudulently, wilfully, and maliciously to deprive the said Christian K. Ross and Sarah Ann Ross of their aforesaid lawful charge, care, guardianship, and possession of the said Charles Brewster Ross, and the love, affection, and society of and communication and intercourse with the said Charles Brewster Ross, to the prejudice of the right of them the said Christian K. Ross and Sarah Ann Ross, and to the great

damage of them the said Christian K. Ross and Sarah Ann Ross.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that in pursuance of their unlawful, false, fraudulent, wilful, and malicious combination, confederacy, conspiracy, and agreement as aforesaid, they the said William Mosher, alias William Henderson, and Joseph Douglass, alias Joseph Clark, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, did unlawfully, fraudulently, wilfully, and maliciously decoy, entice, lead, take, and carry the said Charles Brewster Ross away from and out of and from the lawful charge, care, guardianship, and possession of the said Christian K. Ross and Sarah Ann Ross as aforesaid, he the said Charles Brewster Ross then and there being a minor child under the age of six years as aforesaid, and they the said Christian K. Ross and Sarah Ann Ross then and there being the lawful parents and guardians of the said Charles Brewster Ross as aforesaid, and then and there having the lawful charge, care, guardianship, and possession of the said Charles Brewster Ross as aforesaid.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that in further pursuance of their unlawful, false, fraudulent, wilful, and malicious combination, confederacy, conspiracy, and agreement as aforesaid, afterwards, to wit, on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, the said Charles Brewster Ross, so unlawfully, fraudulently, wilfully, and maliciously decoyed, enticed, led, taken, and carried away out of and from the lawful charge, care, guardianship, and possession of his said parents, the said Christian K. Ross and Sarah Ann Ross as aforesaid, they, the said William Westervelt and Mary Westervelt, and William Mosher, alias William Henderson, and Joseph Douglass, alias Joseph Clark, and the divers other persons aforesaid whose names are to this grand inquest as yet unknown as aforesaid, did then and there unlawfully, fraudulently, wilfully, and maliciously receive and harbor, and him the said Charles Brewster Ross, from the said first day of July in the year aforesaid, until the day of the taking of this inquisition, at the county aforesaid, and within the jurisdiction of this court,

from his said parents the said Christian K. Ross and Sarah Ann Ross, and from the aforesaid lawful charge, care, guardianship, and possession of the said Christian K. Ross and Sarah Ann Ross, did then and there unlawfully, fraudulently, wilfully, and maliciously harbor, conceal, and detain, he the said Charles Brewster Ross then and there being a minor child under the age of six years as aforesaid, and they the said Christian K. Ross and Sarah Ann Ross, then and there being the lawful parents and guardians of the said Charles Brewster Ross as aforesaid, and then and there having the lawful charge, care, and possession of the said Charles Brewster Ross as aforesaid, whereby they the said Christian K. Ross and Sarah Ann Ross, from the said first day of July in the year aforesaid, until the day of the taking of this inquisition, at the county aforesaid, and within the jurisdiction of this court, by them the said William Westervelt and Mary Westervelt, and William Mosher, alias William Henderson, and Joseph Douglass, alias Joseph Clark, and the divers other evil disposed persons aforesaid whose names are to this grand inquest as yet unknown as aforesaid, have unlawfully, fraudulently, wilfully, and maliciously been deprived of the lawful charge, care, guardianship, and possession of the said Charles Brewster Ross, and of the love, affection, and society of and communication and intercourse with the said Charles Brewster Ross, to the prejudice of the right of them the said Christian K. Ross and Sarah Ann Ross, and to the great damage of them the said Christian K. Ross and Sarah Ann Ross, contrary, etc.(b) (*Conclude as in book 1, chapter 3.*)

(b) In respect to this form, I have the following note from Mr. Ker, assistant district attorney at the time of the prosecution: "In the case of *Com. v. Westervelt* (quarter sessions, Philadelphia county, April sessions, 1875), I find there were five counts. The first and second charge the misdemeanor of kidnapping Charlie Ross. The third, fourth, and fifth charge conspiracies, with overt acts. On the trial, the jury acquitted on the first and second counts, and convicted on all the others. The penalty for kidnapping is seven years, while for conspiracy it is only two years. The court sentenced the defendant to seven years' imprisonment. In sentencing, the judge said (Judge Elcock) that the overt acts were pleaded in proper form, averring the specific charge of the misdemeanor of kidnapping, and as the jury could have found the defendant guilty of the conspiracy and not guilty of the overt act charged in the same count, but had found a general verdict of guilty, therefore the court was justified in sentencing for kidnapping, and did so sentence."

(651) *Conspiracy to procure the elopement of a minor daughter from her father. First count, charging the conspiracy with an overt act, averring that, in furtherance of the conspiracy, the defendants aided the said minor to elope.*(c)

That at the time of the commission of the several grievances hereinafter mentioned, and for a long time before, at said county,

(c) *Com. v. Mifflin*, 5 W. & S. 461; Wh. Cr. L. 8th ed. §§ 1348, 1359, 1361. This indictment was sustained on error by the supreme court.

The following reasons for a new trial and in arrest of judgment were assigned, which were overruled by the court below, and were assigned for error:—

1st. That the matters charged in the bill of indictment are not indictable.

2d. That the matters charged were not sufficiently stated in the bill of indictment, inasmuch as it contains no specification of the means or overt acts by which the purpose was to be effected.

3d. The purpose to be effected, as laid in the bill, was neither criminal nor unlawful.

4th. That the object of the conspiracy, as charged, was not criminal.

5th. That the conspiracy is alleged to have been by the defendants *and others to the jury unknown*, and the overt acts to have been by the defendants alone, in pursuance of a different conspiracy, to wit, of a conspiracy by the said defendants alone, *without others to the jury unknown*.

Gibson, C. J., after examining the character of the offence, said: “In *Rex v. Pywell* (1 Stark. Rep. 402), a confederacy to cheat in the sale of a horse was held to be innocent; and in *State v. Dickey* (4 Halst. 293), it was held that a civil injury, which is not indictable when committed by an individual, does not contract the quality of guilt by being the act of a confederacy. But the contrary was held in the *State v. Buchanan* (5 Har. & J. 317); and in the *King v. Stratton* (1 Campb. 549), a confederacy to deprive the secretary of a trading company of his office was held not to be indictable only because the company was illegal. These discrepancies show the want of test for doubtful cases; but these are cases of such transcendental wrong and outrage as leave no doubt of their character; and a confederacy to steal a daughter is not the least of them. It is a denial or contempt of the father's right to counsel and advise; and it is only less atrocious than the conspiracy in the *King v. Grey* (3 St. Tr. 519), and that in the *King v. Delavel* (3 Burr. 1473), to ruin a virgin by enticing her to desert her father's protection and live in a state of concubinage. A marriage at twelve, which is valid for the sake of the issue, would be scarce less brutal or offensive to the feelings of the family; and why, but to protect the feelings of relatives, was a combination to take up dead bodies for scientific purposes, which is not essentially immoral, held to be indictable in *Rex v. Lynn*, 2 T. R. 723? But if it would be indictable to procure the elopement of a girl who had just attained the age of consent, at what other age within the period of infancy would such an act be innocent? and how would the law discriminate? It is true that Mr. Justice Buller was of opinion, in *Rex v. Fowler* (2 East's P. C. c. 11, s. 11), that as the act of marriage is lawful in itself, a combination to procure it can become criminal only by the use of undue means; but the parties in that case were *sui juris*, and he left the question, What is undue means? an open one. If the subject of the present indictment is no more than a private wrong, it must pass entirely without rebuke; for it would be easier to find a precedent for a criminal corrective of it, than a civil one. But even a private injury, such

one J. M. N., a daughter of D. N. and M. his wife, of said county, was a minor under the age of twenty-one years, and was dwelling and residing in the family of her said father, and under his paternal care, guardianship, protection, instruction, control, authority, and employment. And the said jurors, on their said oaths and affirmations, do further present, that J. M., late of said county, yeoman, R. C. H., late of said county, physician, and D. H. C., late of said county, yeoman, being persons of evil minds and dispositions, together with divers other evil disposed persons to the jurors aforesaid unknown, on, etc., at, etc., with force and arms, etc., unlawfully, wickedly, falsely, maliciously, and injuriously did conspire, combine, confederate, and agree together to cause, effect, produce, and procure the elopement and escape of the said J. M. N. from the house, family, guardianship, protection, control, care, authority, and employment of her said father, the said D. N., without the consent of her said father, and against his will; and in pursuance and furtherance, and according to the said conspiracy, combination, confederacy, and agreement between them, the said J. M., R. C. H., and D. H. C., as aforesaid had, did, on the night between the tenth and eleventh days of June, in the year aforesaid, at said county, entice, persuade, cause, procure, and assist the said J. M. N. to elope, escape, and depart from her said father's, the said D. N.'s house, family, care, guardianship, protection, authority, control, and employment, secretly, covertly, and without his leave, consent, or approbation, and against his will, the said J. then and there still

as hissing an actor, or impoverishing a man, becomes a public wrong when done in concert; and this was certainly so.

"Even had the precedents not reached the case before us, there would be no reason why the law of conspiracy should stop short of it now, considering the smallness of the point from which it started, and the degree of its subsequent expansion. In Lord Coke's day it was limited to 'a consultation and agreement, between two or more, to appeal or indict a person falsely and maliciously' (3 Inst. 143); since when it has spread itself over the whole surface of mischievous combination. I am not one of those who fear that the catalogue of crimes will be unduly enlarged by its progress, seeing, as I do, that it is never invoked except as a corrective of disorder, which would else be without one, and as a curb to the immoderate power to do mischief which is gained by a combination of the means. It is true that there is no recent precedent of an indictment like the present; but had not the 3 Hen. VII. c. 2, and the 39 Eliz. c. 9, provided a more energetic remedy for the offence, common law precedents of indictments for it would have abounded. But were we without even the semblance of a precedent, we could not hesitate to pronounce the act of which the defendants have been convicted a common law offence."

being a minor under the age of twenty-one years ; to the great damage of the said D. N., and of his said minor daughter, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(652) *Second count. Conspiracy to procure the elopement of the said minor with the intent to marry her to one C. K., and overt act charging the elopement, etc.*

That the said J. M., R. C. H., and D. H. C., together with divers persons to the jurors aforesaid unknown, being persons of evil minds, and dispositions, afterwards, to wit, on, etc., at, etc., with force and arms, etc., unlawfully, wickedly, deceitfully, maliciously, and injuriously did conspire, combine, confederate, and agree together to cause, induce, persuade, and procure the said J. M. N., the said J. then and there being a minor under the age of twenty-one years, and dwelling and residing in the house and family of her father, D. N., and under his paternal care, guardianship, protection, control, and authority, to escape, elope, and depart from her said father's house, family, care, guardianship, protection, and control, without her said father's consent, and against his will, with the view, purpose, and intent that she the said J. M. N. might be joined in marriage with one C. K., without the consent and approbation and against the wish and will of the said D. N., and in violation of his lawful and parental rights and authority. And the jurors aforesaid, on their oaths and affirmations aforesaid, do further present, that the said J. M., R. C. H., and D. H. C., with the said other persons unknown, in pursuance and furtherance of, and according to the said conspiracy, combination, confederacy, and agreement, between the said J. R., and D., as aforesaid had, did, on the night between the tenth and eleventh days of June, in the year aforesaid, and about the hour of one o'clock, at Shippensburg, in said county, and within the jurisdiction of this court, wickedly, falsely, maliciously, unlawfully, and injuriously entice, persuade, cause, procure, aid, and assist the said J. M. N. to elope, escape, and depart from her said father's house, family, care, guardianship, protection, control, and authority, in the company and along with the said C. K., and secretly and without the knowledge, approbation, and consent, and against the will of the said D. N., with

the view, purpose, and intent that she the said J. M. N. should be joined in marriage with the said C. K., without the consent and against the will of her said father; and with the same intent and purpose, and in furtherance and according to the said conspiracy, combination, confederacy, and agreement, the said J. M., R. C. H., and D. H. C., and other persons unknown, then and there did aid, assist, abet, and coöperate with the said J. M. N. and C. K., secretly and covertly to carry away and remove a large quantity of clothing, goods, and chattels of the said D., and to place the said J. M. N. and the said goods, chattels, and clothing within and upon a certain railroad car then and there passing, so that the said J. might be swiftly and secretly conveyed and carried away and transported beyond the pursuit and protection of her said father, with the intent, view, and purpose aforesaid; to the great damage of the said D. N., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(653) *Conspiracy to inveigle a daughter from the custody of her parents, for the purpose of marrying her (in substance).*(d)

That C. S. was an infant of thirteen years of age (her father P. S. being dead, and S. her mother married to C. G.) and under the guardianship of M. S. and A. S., both as to person and estate, and that the same C. was entitled to a large property under her father's will, to wit, one thousand pounds, and resided with the said G. and S., with the consent of her said guardians, and that the said M. H. *et al.*, well knowing the premises, on, etc., did conspire together to deprive the said G. and S. of the service of the said C. S. and to seduce her from their house, and to inveigle her into a marriage with the said M. H., and under divers false pretences did seduce and inveigle the said C. S., for the purposes aforesaid, against the will of said G. and S. and of the said M. and A., and in pursuance of the said conspiracy did supply the said C. S. with wine and other strong liquors, and she the said C. S. being intoxicated, did procure the ceremony of marriage to

(d) *Resp. v. Hevice*, 2 Yeates, 114. This is the mere skeleton of the indictment employed in this case. I have been unable to discover the record. See *Wh. Cr. L.* 8th ed. §§ 1364, 1404. In *Com. v. Westervelt*, Phila., 1875 (the Charlie Ross case) an indictment for abduction containing counts for conspiracy to abduct was sustained. *Supra*, 203a.

be recited between the said M. H. and C. S., to the great damage and disgrace of the said C. S., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(653a) *Conspiring to bring about a sham marriage.*

The jurors of the grand jury of, etc., and for, etc., legally convoked, impanelled, tried, sworn, and charged in the name and by the authority of, etc., upon their oaths do aver, find, and present, that C. S. and C. A., at, etc., in, etc., with force and arms, unlawfully, wickedly, deceitfully, maliciously, and injuriously did conspire, combine, confederate, and agree together, to cause, induce, persuade, and procure one M. E. E. S., commonly known as E. or L. S., she the said, etc., then and there being a minor under the age of twenty-one years, to wit, nineteen years old, to go with them, the said C. S. and C. A., with the view, purpose, and intention of bringing about a sham marriage or pretended marriage between her, the said L. S., and him, the said C. S., and thus bring about the seduction of her, the said L. S., in violation of law.

And the jurors aforesaid, on their oaths and by the authority aforesaid, do further find and present, that the said C. S. and C. A., in pursuance and in furtherance of and according to the said conspiracy and agreement between them, the said C. S. and C. A., as aforesaid had, did, on or about the time and place aforesaid, wickedly, falsely, maliciously, unlawfully, and injuriously entice, persuade, cause, and procure her, the said L. S., to go in the company and along with them, the said C. S. and C. A., with the view of causing her said sham or pretended marriage, and her said seduction with and by him, the said C. S., as aforesaid; and in furtherance of and according to the said conspiracy, combination, confederacy, and agreement, the said C. S. and C. A. then and there did aid, assist, and carry away the said L. S., in a certain buggy then and there procured by said C. S. and C. A. therefor, to a certain woods or piece of timber known by the name of the "North Fork Timber," near by a place commonly known therein as the "Devil's Den," and while then and there as aforesaid, he, the said C. A., wilfully and falsely assuming to be an officer who is and was lawfully authorized to perform the marriage ceremony and join in wedlock

persons who wish to become married, to wit, a justice of the peace of said county, then and there, in furtherance of said unlawful conspiracy and agreement, performed a pretended marriage ceremony or service for her, the said L. S., and him, the said C. S., and did then and there, in furtherance of such unlawful conspiracy and agreement, unlawfully pronounce her, the said L. S., and him, the said C. S., lawful man and wife; that then and there she, the said L. S., believing that she was such lawful wife, allowed him the said C. S. to then and there have carnal connection of and with her, the said L. S., to the great injury of her, the said L. S., and to the evil example of others, and contrary, etc.(e) (*Conclude as in book 1, chapter 3.*)

(653b) *Conspiracy to concoct fraudulent marriage.*

The jurors for the commonwealth, etc., on their oaths present, that E. R. B., M. M. W., L. D., H. M. J., and M. S. M., all of said B., on, etc., at, etc., with wicked intent to cause it falsely to appear of record that one R. D. R. was lawfully married to said Maud (M. M. W.), with intent to injure said R. thereby, and to prevent said R. (he, the said R., then and ever since being an unmarried man) from contracting any marriage except with said Maud, and with intent to cheat and defraud, unlawfully and wickedly did combine, conspire, confederate, and agree together that said M. should then and there apply in person to N. A. A., the registrar of births, deaths, and marriages, duly appointed and qualified in said city of B., to record all facts concerning marriages, and should falsely represent to said registrar that he, said M., was said R. D. R. (said R. then being a citizen of B., other than said M.), and should, in the office of said registrar in said B., give notice and state that said R. and said Maud were both then residents of said B., and that said R. and Maud then intended shortly to be joined in marriage at said B., and should request and obtain from said registrar the certificate of said notice in such case required by law to be given by said registrar; that thereafter at said B., said B.

(e) In *State v. Savage*, 48 Iowa, 562, it was held that the above indictment charged a conspiracy to commit a crime. It was not necessary, it was ruled, that such an indictment should in terms charge that the woman was unmarried and of previously chaste character.

(he, the said B., being then and there a justice of the peace for said county of S., duly commissioned and qualified) should falsely, and before and without any marriage between said Maud and said R., write a certain certificate and writing under the hand of and signed by him, said B., as such justice, purporting to be a copy of a truthful and genuine record of a marriage, therein falsely to be alleged to have been solemnized by said B., as such justice at said B., between said R. and said Maud, pursuant to said notice, and said certificate to be obtained from said registrar in manner and form as aforesaid; and that said D. and J. should thereupon falsely and publicly pretend to have been present at such marriage as witnesses thereto; and that said Maud should thereupon, without the knowledge of said R., cause to be delivered such copy of record of marriage (signed by said B. as aforesaid) to said registrar at his said office, for record, as and for a true and genuine copy of a truthful and genuine record of marriage, and that thereafter said Maud should publicly assume to be the wife of said R., and that the said B., D., J., and M. should declare such assumption to be just and true within their own knowledge; and the jurors aforesaid, upon their oath aforesaid, do further present, that then and there, in pursuance of said conspiracy and agreement, said M. did then and there apply to said registrar and give said notice, and then and there pretend to be said R., and did then receive such certificate of said notice from said registrar; and said B. did thereafter, to wit, on said day, at said B., as such justice, write and sign such false copy of record as and for a true certificate and copy of a truthful record of marriage, and said D. and J. did then and there publicly declare themselves to have been witnesses of such marriage, and said Maud did thereafter cause said writing, signed by said B., to be duly entered and recorded in the office of said registrar, at said B.; and said Maud did thereafter publicly say and aver falsely, that she, said Maud, was the lawful wife of said R., and said B., D., J., and M. did declare the same to be true as of their own knowledge.

Whereas, in truth and in fact, said M. then and there was not R. D. R., but said R. was a man other than said M.; and said R. did not then and there, nor did he at any time, intend

to be joined in marriage with said Maud ; nor did said R. desire said notice to be given to said registrar by said M., or by any other person, or by himself, said R. ; nor did he, said R., at any time before said notice was given as aforesaid, know that the same was to be given ; and whereas, in truth and fact, said R. was never joined in marriage by said B. to said Maud, nor was he, said R. ever married to any person whomsoever, nor was there any truthful record of any marriage between said Maud and said R., all of which said B., D., W., J., and M., at the time they so combined, confederated, and agreed together as aforesaid, and at the time they committed the acts hereinbefore set forth, then and there all well knew. And so the jurors aforesaid, upon their oaths aforesaid, do say, that said B., M., J., D., and W., at said B., on said, etc., did unlawfully combine, conspire, confederate, and agree together, by the means and in the form aforesaid, to cause said R. falsely to appear of record to be married to said Maud, against the law, peace, etc. (f) (*Conclude as in book 1, chapter 3.*)

(654) *For a conspiracy to procure the defilement of a female.* (g)

That Mary Ann Mears, late of B., in the county of S., single woman, and Amelia Chalk, late of the same place, laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, did between themselves conspire, combine, confederate, and agree together wickedly, knowingly, and designedly to procure, by false pretences, false representations, and other fraudulent means, one Johanna Carroll, then being a poor child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown ; against the peace, etc.

(f) Sustained in *Com. v. Waterman*, 122 Mass. 43.

(g) This count was held to sufficiently charge an indictable offence at common law, in *R. v. Mears*, 1 T. & M., C. C. 414 ; 2 Denison, C. C. 79 ; 4 Cox, C. C. 423 ; 1 Eng. Law & Eq. Rep. 581 ; Wh. Cr. L. 8th ed. §§ 1361, 1363.

(655) *For a conspiracy to incite J. N. to lay wagers, etc. ; overt act, actually cheating.*(h)

That R. S., late of, etc., yeoman, together with a certain other person to the inquest aforesaid unknown, being persons of evil name and fame, and not caring to get their livelihood by honest labor, but by fraud and covin maintaining their idle and disorderly course of life (averring year and day, place and jurisdiction), unlawfully and wickedly did combine and conspire and agree together to cheat and defraud the liege citizens of this commonwealth, and particularly a certain J. N., of their money, goods, and chattels, by art, fraud, practice, and deceit, and then and there unlawfully and wickedly did combine, conspire, and agree together, that he the said R. S. should provoke and incite the said liege citizens of this commonwealth, but particularly the said J. N. aforesaid, to bet and lay wagers with the said unknown person, with an intent, in the said betting and wagering, to deceive and impose on and cheat the said liege citizens of this commonwealth, and particularly the said J. N., and them the said liege citizens of this commonwealth, and particularly J. N. aforesaid, of money, goods, and chattels, by false tricks and deceit in and about the betting and wagering aforesaid, deceive and defraud, to the great damage of the said liege citizens of this commonwealth, and particularly to the said J. N., to the evil example, etc., and against, etc.

And that the said R. S., together with the said other person to the inquest aforesaid unknown, in pursuance of such their conspiracy aforesaid, afterwards, to wit, on the day and year aforesaid, at the city aforesaid, and within the jurisdiction aforesaid, did wickedly and fraudulently provoke and incite the said J. N. to lay wagers with the unknown person aforesaid, and that the said R. S., together with the person to the inquest aforesaid unknown as aforesaid, by betting and laying wagers with the said J. N., then and there did get into their possession, unlawfully and wickedly, the sum of fifteen shillings, lawful money of Pennsylvania, of the goods and chattels of the said J. N., and him the said J. N. of the said sum of fifteen shillings aforesaid, lawful

(h) Drawn by Mr. Bradford when attorney-general of Pennsylvania.

money as aforesaid, by false acts and tricks then and there did deceive and defraud and cheat.

And so the inquest aforesaid, on their oaths and affirmations aforesaid, do say, that the said R. S., together with the said other person to the inquest aforesaid unknown, according to the conspiracy, combination, and agreement aforesaid, the aforesaid J. N. of the sum of fifteen shillings, lawful money aforesaid, in manner and form aforesaid fraudulently and wickedly did deceive, cheat, and defraud, contrary, etc., to the great damage, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(656) *Conspiracy at common law, among workmen, to raise their wages and lessen the time of labor.*(i)

That A. B., etc. (*setting out their names and additions*), on, etc., at, etc., being workmen and journeymen in the art, mys-

(i) Starkie's C. P. 471. See Wh. Cr. L. 8th ed. § 1366.

The particularity required in indictments of this class is thus discussed by Shaw, C. J., in *Com. v. Hunt*, 4 Metc. 125.

"The first count," he said, "set forth that the defendants, with divers others unknown, on the day and at the place named, being workmen and journeymen in the art and occupation of bootmakers, unlawfully, perniciously, and deceitfully designing and intending to continue, keep up, form, and unite themselves into an unlawful club, society, and combination, and make unlawful by-laws, rules, and orders among themselves, and thereby govern themselves and other workmen in the said art, and unlawfully and unjustly to extort great sums of money by means thereof, did unlawfully assemble and meet together, and being so assembled, did unjustly and corruptly conspire, combine, confederate, and agree together, that none of them should thereafter, and that none of them would work for any master or person whatsoever in said art, mystery, and occupation, who should employ any workman or journeymen or other person in the said art who was not a member of said club, society, or combination, after notice given to him to discharge such workman from the employ of such master; to the great damage and oppression, etc.

"Now it is to be considered that the preamble and introductory matter in the indictment—such as unlawfully and deceitfully designing and intending unjustly to extort great sums, etc.—is mere recital, and not traversable, and therefore cannot aid an imperfect averment of the facts constituting the description of the offence. The same may be said of the concluding matter which follows the averment, as to the great damage and oppression, not only of their said masters employing them in the said art and occupation, but also of divers other workmen in the same art, mystery, and occupation, to the evil example, etc. If the facts averred constitute the crime, they are properly stated as the legal inferences to be drawn from them. If they do not constitute the charge of such an offence, they cannot be aided by these alleged consequences.

"Stripped then of these introductory recitals and alleged injurious consequences, and of the qualifying epithets attached to the facts, the averment is this, that the defendants and others formed themselves into a society, and agreed not to work for any person who should employ any journeyman or other person not a member of such society, after notice given him to discharge such workman.

tery, and manual occupation of a wheelwright, and not being content to work and labor in that art and mystery by the usual

“The manifest intent of the association is to induce all those engaged in the same occupation to become members of it. Such a purpose is not unlawful. It would give them a power which might be exerted for useful and honorable purposes, or for dangerous and pernicious ones. If the latter were the real and actual object, and susceptible of proof, it should have been specially charged. Such an association might be used to afford each other assistance in times of poverty, sickness, and distress; or to raise their intellectual, moral, and social condition; or to make improvement in their art; or for other purposes; or the association might be designed for the purposes of oppression and injustice. But in order to charge all those who become members of an association with the guilt of a criminal conspiracy, it must be averred and proved that the actual, if not the avowed object of the association, was criminal. An association may be formed, the declared objects of which are innocent and laudable, and yet they may have secret articles, or an agreement communicated only to the members, by which they are banded together for purposes injurious to the peace of society or the rights of its members. Such would undoubtedly be a criminal conspiracy on proof of the fact, however meritorious and praiseworthy the declared objects might be. The law is not to be hoodwinked by colorable pretences. It looks at truth and reality, through whatever disguise it may assume. But to make such an association, ostensibly innocent, the subject of prosecution as a criminal conspiracy, the secret agreement which makes it so is to be averred and proved as the gist of the offence. But when an association is formed for purposes actually innocent, and afterwards its powers are abused by those who have the control and management of it, to purposes of oppression and injustice, it will be criminal in those who thus misuse it, or give consent thereto, but not in the other members of the association. In this case no such secret agreement varying the objects of the association from those avowed, is set forth in this count of the indictment.

“Nor can we perceive that the objects of this association, whatever they may have been, were to be attained by criminal means. The means which they propose to employ, as averred in this count, and which, as we are now to presume, were established by the proof, were, that they would not work for a person, who, after due notice, should employ a journeyman not a member of their society. Supposing the object of the association to be laudable and lawful, or at least not unlawful, are these means criminal? The case supposes that these persons are not bound by contract, but free to work for whom they please, or not to work if they so prefer. In this state of things, we cannot perceive that it is criminal for men to agree together to exercise their own acknowledged rights, in such a manner as best to subserve their own interests. One way to test this is, to consider the effect of such an agreement, where the object of the association is acknowledged on all hands to be a laudable one. Suppose a class of workmen, impressed with the manifold evils of intemperance, should agree with each other not to work in a shop in which ardent spirit was furnished, or not to work in a shop with any one who used it, or not to work for an employer who should, after notice, employ a journeyman who habitually used it. The consequences might be the same. A workman who should still persist in the use of ardent spirit would find it more difficult to get employment; a master employing such an one might, at times, experience inconvenience in his work, in losing the services of a skilful but intemperate workman. Still it seems to us, that as the object would be lawful, and the means not unlawful, such an agreement could not be called a criminal conspiracy.

“From this count in the indictment, we do not understand that the agreement was, that the defendants would refuse to work for an employer to whom they were bound by contract for a certain time, in violation of that contract; nor that

number of hours in each day, and at the usual rates and prices for which they and other workmen and journeymen were wont

they would insist that an employer should discharge a workman engaged by contract for a certain time, in violation of such contract. It is perfectly consistent with everything stated in this count, that the effect of the agreement was, that when they were free to act, they would not engage with an employer, or continue in his employment; if such employer, when free to act, should engage with a workman, or continue a workman in his employment, not a member of the association. If a large number of men, engaged for a certain time, should combine together to violate their contract, and quit their employment together, it would present a very different question. Suppose a farmer employing a large number of men engaged for the year at a fair monthly wages, and suppose that just at the moment that his crop were ready to harvest they should all combine to quit his service unless he would advance their wages, at a time when other laborers could not be obtained; it would surely be a conspiracy to do an unlawful act, though of such a character that, if done by an individual, it would lay the foundation of a civil action only, and not of a criminal prosecution. It would be a case very different from that stated in this count.

"The second count, omitting the recital of the unlawful intent and evil dispositions, and omitting the direct averment of an unlawful club or society, alleges that the defendants, with others unknown, did assemble, conspire, confederate, and agree together not to work for any master or person who should employ any workman not being a member of a certain club, society, or combination, called the Boston Journeymen Bootmakers' Society, or who would break any of their by-laws, unless such workmen should pay to said club such sum as should be agreed upon as a penalty for the breach of such unlawful rules, etc., and that by means of said conspiracy they did compel one J. B. W., a master cordwainer, to turn out of his employ one J. H., a journeyman bootmaker, etc., in evil example, etc. So far as the averment of a conspiracy is concerned, all the remarks made in reference to the first count are equally applicable to this. It is simply an averment of an agreement amongst themselves not to work for a person who should employ any person not a member of a certain association. It sets forth no illegal or criminal purpose to be accomplished, nor any illegal or criminal means to be adopted for the accomplishment of any purpose. It was an agreement, as to the manner in which they would exercise an acknowledged right to contract with others for their labor. It does not aver conspiracy, or even an intention to raise their wages; and it appears by the bill of exceptions, that the case was put upon the footing of a conspiracy to raise their wages. Such an agreement, as set forth in this count, would be perfectly justifiable under the recent English statute, by which this subject is regulated. St. 6 Geo. IV. c. 129. See *Rosecoe's Crim. Ev.* (2d Am. ed.), 368, 369.

"As to the latter part of this count, which avers that by means of said conspiracy the defendants did compel one W. to turn out of his employ one J. H., we remark, in the first place, that as the acts done in pursuance of a conspiracy, as we have before seen, are stated by way of aggravation, and not a substantive charge, if no criminal or unlawful conspiracy is stated, it cannot be aided and made good by mere matter of aggravation. If the principal charge falls, the aggravation falls with it. *State v. Rickey*, 4 Halst. 293.

"But further; if this is to be considered as a substantive charge, it would depend altogether upon the force of the word 'compel,' which may be used in the sense of coercion, or duress, by force or fraud. It would therefore depend upon the context and the connection with other words, to determine the sense in which it was used in the indictment. If, for instance, the indictment had averred a conspiracy, by the defendants, to compel W. to turn H. out of his employment, and to accomplish that object by the use of force or fraud, it would have been a very different case; especially if it might be fairly construed, as perhaps in that

and accustomed to work, but falsely and fraudulently conspiring and combining, unjustly and oppressively to increase and aug-

case it might have been, that W. was under obligation, by contract, for an unexpired term of time, to employ and pay H. As before remarked, it would have been a conspiracy to do an unlawful, though not a criminal act, to induce W. to violate his engagement, to the actual injury of H. To mark the difference between the case of a journeyman or a servant and master, mutually bound by contract, and the same parties when free to engage anew, I should have before cited the case of *Boston Glass Co. v. Binney*, 4 Pick. 425. In that case, it was held actionable to entice another person's hired servant to quit his employment, during the time for which he was engaged; but not actionable to treat with such hired servant, while actually hired and employed by another, to leave his service, and engage in the employment of the person making the proposal, when the term for which he is engaged shall expire. It acknowledges the established principle, that every free man, whether skilled laborer, mechanic, farmer, or domestic servant, may work or not work, or work or refuse to work, with any company or individual, at his own option, except so far as he is bound by contract. But whatever might be the force of the word 'compel,' unexplained by its connection, it is disarmed and rendered harmless by the precise statement of the means by which such compulsion was to be effected. It was the agreement not to work for him, by which they compelled W. to decline employing H. longer. On both of these grounds we are of opinion that the statement made in the second count, that the unlawful agreement was carried into execution, makes no essential difference between this and the first count.

"The third count, reciting a wicked and unlawful intent to impoverish one J. H., and hinder him from following his trade as a bootmaker, charges the defendants, with others unknown, with an unlawful conspiracy, by wrongful and indirect means, to impoverish said H., and to deprive and hinder him from his said art and trade and getting his support thereby, and that, in pursuance of said unlawful combination, they did unlawfully and indirectly hinder and prevent, etc., and greatly impoverish him.

"If the fact of depriving J. H. of the profits of his business, by whatever means it might be done, would be unlawful and criminal, a combination to compass that object would be an unlawful conspiracy, and it would be unnecessary to state the means. Such seems to have been the view of the court in *The King v. Eccles* (3 Dougl. 337), though the case is so briefly reported that the reasons on which it rests are not very obvious. The case seems to have gone on the ground, that the means were matter of evidence, and not of averment; and that after verdict, it was to be presumed that the means contemplated and used were such as to render the combination unlawful, and constitute a conspiracy.

"Suppose a baker in a small village had the exclusive custom of his neighborhood, and was making large profits by the sale of his bread. Supposing a number of those neighbors, believing the price of his bread too high, should propose to him to reduce his prices, or if he did not, that they would introduce another baker; and on his refusal, such other baker should, under their encouragement, set up a rival establishment, and sell his bread at lower prices; the effect would be to diminish the profit of the former baker, and to the same extent to impoverish him. And it might be said and proved, that the purpose of the associates was to diminish his profits, and thus impoverish him, though the ultimate and laudable object of the combination was to reduce the cost of bread to themselves and their neighbors. The same thing may be said of all competition in every branch of trade and industry; and yet it is through that competition that the best interests of trade and industry are promoted. It is scarcely necessary to allude to the familiar instances of opposition lines of conveyance, rival hotels, and the thousand other instances, where each strives to gain custom to himself, by inge-

ment the wages of themselves and other workmen and journey-men in the said art, and unjustly to exact and extort great sums

nious improvements, by increased industry, and all the means by which he may lessen the price of commodities, and thereby diminish the profits of others.

“We think, therefore, that associations may be entered into, the object of which is to adopt measures that may have a tendency to impoverish another, that is, to diminish his gains and profits, and yet so far from being criminal or unlawful, the object may be highly meritorious and public spirited. The legality of such an association will therefore depend upon the means to be used for its accomplishment. If it is to be carried into effect by fair or honorable and lawful means, it is, to say the least, innocent; if by falsehood or force, it may be stamped with the character of conspiracy. It follows as a necessary consequence, that if criminal and indictable, it is so by reason of the criminal means intended to be employed for its accomplishment; as a further legal consequence, that as the criminality will depend on the means, those means must be stated in the indictment. If the same rule were to prevail in criminal, which holds in civil proceedings—that a case defectively stated may be aided by a verdict—then a court might presume, after verdict, that the indictment was supported by proof of criminal or unlawful means to effect the object. But it is an established rule in criminal cases, that the indictment must state a complete indictable offence, and cannot be aided by the proof offered at the trial.

“The fourth count avers a conspiracy to impoverish J. H., without stating any means; and the fifth alleges a conspiracy to impoverish employers, by preventing and hindering them from employing persons not members of the Bootmakers’ Society; and these require no remarks which have not been already made in reference to the other counts.

“One case was cited, which was supposed to be much in point, and which is certainly deserving of great respect,—*People v. Fisher*, 14 Wend. 9. But it is obvious that this decision was founded on the construction of the revised statutes of New York, by which this matter of conspiracy is now regulated. It was a conspiracy by journeymen to raise their wages, and it was decided to be a violation of the statutes making it criminal to commit any act injurious to trade or commerce. It has, therefore, an indirect application only to the present case.

“A caution on this subject, suggested by the commissioners for revising the statutes of New York, is entitled to great consideration. They are alluding to the question, whether the law of conspiracy should be so extended as to embrace every case where two or more unite in some fraudulent measure to injure an individual, by means not in themselves criminal. ‘The great difficulty,’ say they, ‘in enlarging the definition of this offence, consists in the inevitable result of depriving the courts of equity of the most effectual means of detecting fraud, by compelling a discovery on oath. It is a sound principle of our institutions, that no man shall be compelled to accuse himself of any crime; which ought not to be violated in any case. Yet such must be the result, or the ordinary jurisdiction of courts of equity must be destroyed, by declaring any private fraud, when committed by two, or any concert to commit it, criminal.’ 9 Cow. 625. In New Jersey, in a case which was much considered, it was held that an indictment will not lie for a conspiracy to commit a civil injury. *State v. Riekey*, 4 Halst. 293. And such seemed to be the opinion of Lord Ellenborough, in *The King v. Turner* (13 East, 231), in which he considered that the case of *The King v. Eccles* (3 Dougl. 337), though in form an indictment for a conspiracy to prevent an individual from carrying on his trade, yet in substance was an indictment for a conspiracy in restraint of trade, affecting the public.

“It appears by the bill of exceptions, that it was contended on the part of the defendants that the indictment did not set forth any agreement to do a criminal act, or to do any lawful act by criminal means, and that the agreement therein set forth did not constitute a conspiracy indictable by a law of this state, and that the

of money for their labor and hire in the said art, mystery, and manual occupation, from their masters, who employ them therein, with force and arms, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, together with divers other workmen and journeymen in the same art, mystery, and manual occupation (whose names to the jurors aforesaid are as yet unknown), unlawfully did assemble and meet together, and so being assembled and met, did then and there unjustly and corruptly conspire, combine, confederate, and agree among themselves, that none of the said conspirators, after the same day of would make or do their work at any lower or lesser rate than five shillings for the hewing of every hundred of spokes for wheels, and eight shillings for making of every pair of hinder wheels, for or on account of any master or employer whatsoever in said art, mystery, and occupation, and also that none of them the said conspirators would work day work or labor any longer than from the hour of six in the morning till the hour of seven in the evening in each day, from thenceforth, to the great damage and oppression not only of their masters employing them in the said art, mystery, and occupation, but also of divers others of his majesty's liege subjects, and against, etc. (*Conclude as in book 1, chapter 3.*)

court was requested so to instruct the jury. This the court declined doing, but instructed the jury that the indictment did describe a confederacy among the defendants to do an unlawful act, and to do the same by unlawful means—that the society, organized and associated for the purposes described in the indictment, was an unlawful conspiracy against the laws of this state, and that if the jury believed, from the evidence, that the defendants or any of them, had engaged in such confederacy, they were bound to find such of them guilty.

“In this opinion of the learned judge, this court, for the reasons stated, cannot concur. Whatever illegal purpose can be found in the constitution of the Bootmakers' Society, it not being clearly set forth in the indictment, cannot be relied upon to support this conviction. So if any facts were disclosed at the trial, which, if properly averred, would have given a different character to the indictment, they do not appear in the bill of exceptions, nor could they, after verdict, aid the indictment. But looking solely at the indictment, disregarding the qualifying epithets, recitals, and immaterial allegations, and confining ourselves to facts so averred as to be capable of being traversed and put in issue, we cannot perceive that it charges a criminal conspiracy punishable by law. The exceptions must therefore be sustained, and the judgment arrested.”

Some difficulty will arise in adapting the indictment in the text either to the above decision, or to the present course of judicial opinions. Wh. Cr. L. 8th ed. §§ 1366 *et seq.* See, however, notes to next form.

(657) *Conspiracy by workmen, etc., in the employ of A. and B., to prevent their masters from retaining any person as an apprentice.*(j)

That the defendants, with divers other evil disposed persons to the jurors unknown, on, etc., at, etc., being journeymen and

(j) R. v. Ferguson, 2 Stark. N. P. C. 489.

In the second count it was charged that the defendants, together with other evil disposed persons, afterwards, to wit, on, etc., at, etc., being such journeymen and workmen as aforesaid, in the employment of the S. D. and R. F., maliciously intending to hurt, injure, and impoverish their said employers, and to prevent them from retaining any other journeymen and workmen, and retaining and instructing apprentices in the said occupation, did conspire, combine, confederate, and agree to quit, leave, and turn out from their said employment at one and the same time together, to the great damage, etc.

In a third count it was alleged that the defendants, together with the said other evil disposed persons, afterwards, to wit, on, etc., at, etc., being such journeymen and workmen as aforesaid, in the employment of the said S. D. and R. F., maliciously intending to control, injure, terrify, and impoverish their said employers, and force and compel them to dismiss from their said employment divers persons then and there retained by them as journeymen, workmen, and apprentices therein, unlawfully did conspire, combine, confederate, and agree to quit, leave, and turn out from their said employment, until the said last mentioned journeymen, workmen, and apprentices should be dismissed by their said masters and employers, to the great damage, etc.

It appeared that upon the prosecutors taking into their employment a young person of the name of G. as an apprentice, the defendants, together with a number of journeymen, declared to the prosecutors that they would not stand it, and after consultation left their work, and that G.'s agreement was given up to him, and he went away. The rest of the workmen were conciliated for the time, by the prosecutors agreeing to relinquish G. the apprentice. Some time afterwards F. and the other workmen again turned out, upon the prosecutors taking into their service another apprentice of the name of M. At the time of these turn-outs, the prosecutors had in their employment sixteen journeymen and eight apprentices, and it appeared upon the cross-examination of one of the prosecutors that the objection which had been made by the defendants and their associates did not apply to the eight apprentices which the prosecutors then had in their employment, but that they objected to the prosecutors taking a greater number of apprentices than half the number of journeymen.

It was objected on behalf of the defendants, upon this evidence, that it varied from the indictment, which alleged generally a conspiracy to prevent the masters from taking into their employment any apprentices, etc.; whereas it should have been alleged according to the fact, to be a conspiracy to hinder their masters from taking into their employment any more apprentices, or a number exceeding half the number of journeymen; but,

Wood, B., was of opinion, that the indictment was sufficiently supported by the evidence, since the effect was to prevent the masters from taking into their employment any person as an apprentice, to be taught and instructed, as alleged in the indictment.

The defendants were both found guilty.

When the defendants were brought before the court of king's bench for judgment in the ensuing term, the objection was renewed, but the court were of opinion that the indictment was sufficiently proved; and it was intimated that the evidence applied to the third count as well as the first, since, in order to support the

workmen in the trade, mystery, and manual occupation of engravers, in the employment of S. D. and R. F., did conspire, combine, confederate, and agree together to prevent, hinder, and deter their said masters and employers from retaining and taking into their employment any person as an apprentice, to be taught and instructed in the said trade and occupation, to the great damage, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(657a) *Conspiracy to compel the reinstatement of a discharged employé.*

First count.

The jurors for, etc., upon their oath present, that heretofore and at the time of committing the offence hereinafter charged, a certain public company, called the G. L. & C. Co., carried on, used, and exercised the trade and business of manufacturers and vendors of gas, hiring and employing divers servants, workmen, and laborers in their said trade and business, at wages mutually agreed upon between them the G. L. & C. Co. and the said workmen and laborers, and that the said G. L. & C. Co. had so hired and employed one T. D. as such servant, and had lawfully, and for good and sufficient cause and reason, discharged the said T. D. from the service of the said company. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. B., G. R., E. J., R. W., S. W., J. C., and the said T. D., and divers other persons whose names to the jurors aforesaid are unknown, well knowing the premises, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to injure, prejudice, and annoy the said company, and to force and to endeavor to force the said company to make alterations in their mode of conducting and carrying on the said trade and business, on, etc., at, etc., unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, and by divers threats and menaces, and other un-

third count, it was sufficient to prove that the defendants turned out from their employment with intent to compel their masters to dismiss any one apprentice. The defendants received sentence of fine and imprisonment.

lawful and wicked means and devices, to obtain, extort, and procure of and from one G. C. T., then being the superintendent of the B. works of the said G. L. & C. Co., and then being lawfully authorized to appoint and discharge the servants and workmen of the said company, the promise of him, the said G. C. T., contrary to his own free will, to take back, and reinstate in the service of the said company, the said T. D., to the great damage and injury of the said company, to the evil example of all others in like case offending, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. B., G. R., etc., and divers other persons, whose names are unknown to the jurors aforesaid, well knowing the premises in the first count mentioned, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to injure, prejudice, and annoy the said G. L. & C. Co., and to force and endeavor to force the said company to make alterations in their mode of conducting and carrying on their said trade and business, afterwards, to wit, on the day and in the year aforesaid, at the parish aforesaid, in the county aforesaid, and within the jurisdiction of, etc., unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, and by divers threats and menaces, and other unlawful and wicked means and devices, to obtain, procure, and compel the said company, contrary to their own free will and judgment, to reinstate the said T. D. in the service of the said company, to the great injury, prejudice, and damage of the said G. L. & C. Co., to the evil example of all others in like case offending, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of committing the offence hereinafter in this count mentioned, the said G. L. & C. Co. carried on, used, and exercised the trade and business of manu-

facturers and vendors of gas, and had hired and employed divers, to wit, five hundred servants, workmen, and laborers, to assist them in the said manufacture, at wages mutually agreed upon between the said G. L. & C. Co. and the said servants, workmen, and laborers, under and by virtue of certain lawful contracts made between the said G. L. & C. Co. and the said servants, workmen, and laborers in that behalf, and had hired and employed the said J. B., G. R., etc., and divers other servants, workmen, and laborers, under the said contracts, and the said servants, workmen, and laborers had severally, in and by the said contracts, agreed not to leave the service of the said company without due notice of their intention so to do; and the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, and whilst the said contracts were subsisting, and in full legal force and effect, to wit, on the day and in the year aforesaid, at, etc., the said J. B., G. R., etc., and divers other persons whose names to the jurors aforesaid are unknown, well knowing the premises, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to injure, prejudice, and annoy the said company, and to hinder and prevent the said company from carrying on, using, and exercising their said trade and business, unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, unlawfully to break the said contracts respectively, and that they the said J. B., G. R., etc., and the said other servants, workmen, and laborers should depart from their said hiring and service, and that the said last mentioned persons respectively, should not give respectively to the said company any notice in pursuance of the said contracts respectively, of their intention so to depart from their said hiring and employment, to the great damage and injury of the said company, to the evil example, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore and at the time of committing the offence hereinafter charged, divers public companies carried on,

used, and exercised the trade and business of manufacturers and vendors of gas, hiring and employing divers workmen and laborers in their said trade and business, at wages mutually agreed upon between them, the said companies, and the said workmen and laborers. And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, before and at the time of committing the offence next hereinafter charged, divers public companies, to wit, the G. L. & C. Co., the I. G. Co., the In. G. Co., the C. G. Co., the S. C. G. Co., the P. G. Co., and divers other public companies carried on, used, and exercised the said trade and business of manufacturers and vendors of gas as aforesaid, in divers parishes and places within the jurisdiction of, etc.; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. B., G. R., etc., and divers other persons whose names are unknown to the jurors aforesaid, well knowing the premises, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising, contriving, and intending to impoverish the said several public companies in this count mentioned, and divers other public companies, manufacturers, and vendors of gas, and each of them respectively, on the day and in the year aforesaid, within the jurisdiction of, etc., unlawfully did conspire, combine, confederate, and agree together, amongst themselves, by divers unlawful ways, contrivances, and stratagems, and by divers unlawful and wicked means and devices, to impoverish, in their said trade and business of manufacturers and vendors of gas, the said G. L. & C. Co., the said I. G. Co., etc., and divers other companies respectively, then and there carrying on, using, and exercising the said trade and business of manufacturers and vendors of gas as aforesaid, to the great damage of the said G. L. & C. Co., the said I. G. Co., etc., to the evil example, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. B., G. R., etc., and divers other persons whose names are unknown to the jurors aforesaid, well knowing the premises in the fourth count mentioned, and being evil disposed persons, and unlawfully, wickedly, and unjustly devising,

contriving, and intending to hinder and prevent the said public companies in the fourth count mentioned, and each of them respectively, from carrying on, using, and exercising their said trade and business of manufacturers and vendors of gas, on the day and in the year aforesaid, within the jurisdiction of, etc., unlawfully did conspire, combine, confederate, and agree together amongst themselves, by divers unlawful ways, contrivances, and stratagems, and by divers unlawful and wicked means and devices, to prevent and hinder them, the said G. L. & C. Co., the said I. G. Co., etc., and each of them respectively, from carrying on, using, and exercising their said trade and business so carried on, used, and exercised as aforesaid, to the great damage of the said G. L. & C. Co., the said I. G. Co., etc., to the evil example of, etc. (*Conclude as in book 1, chapter 3.*)

Tenth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that before and at the time of the committing the offence hereinafter in this count mentioned, the said G. L. & C. Co. were possessed of certain buildings, gas holders, retorts, machinery, appliances, and materials for manufacturing gas at B., in, etc., and were under certain acts of parliament legally bound to supply gas for the lighting of the public lamps in certain districts and places in the said acts of parliament mentioned, and were also in like manner bound to supply all the liege subjects of our said lady the queen with gas within said districts at all hours of the day and night. And the jurors aforesaid, upon their oath aforesaid, do further present, that for the purpose of keeping up a constant and continuous supply of gas to the said public lamps, and to the said liege subjects of our said lady the queen, it was necessary to employ a large number of servants, workmen, and laborers, to wit, five hundred servants, workmen, and laborers, to carry on continuously and without interruption the manufacture of the said gas, at the said works at B., and that the work and labor of manufacturing gas was so continuously and without interruption carried on by means of about half of the number of the said servants, workmen, and laborers working in the said works by night, and about half of the number of the said servants, work-

men, and laborers working in the said works by day. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said servants, workmen, and laborers were hired by the said company, and the said servants, workmen, and laborers entered the service of the said company upon an agreement and contract of service, that the said service should not be determined by the said company or by the said servants, workmen, and laborers respectively without a previous notice of their intention respectively so to determine the said service; the object of the said agreement and contract of service being that there should be no interruption in the carrying on the said manufacture of gas at the said works, by reason of any of the said servants, workmen, and laborers suddenly ceasing to perform their part of the said work and labor. And the jurors aforesaid, upon their oath aforesaid, do further present, that previous to, etc., the said continuous manufacture of gas had been and was being carried on at the said works as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that on, etc., at, etc., J. B., G. R., etc., well knowing the premises, and being servants, workmen, and laborers as aforesaid, under contracts of service as aforesaid, and which said contracts of service with the said company as aforesaid had not been determined by previous notice as aforesaid, wilfully, designedly, and unlawfully did conspire, combine, confederate, and agree together, and with divers others whose names are to the jurors unknown, themselves to commit a breach of the said contract of service, and by divers threatening notices, exhortations, persuasions, falsehoods, stratagems, and devices to procure, induce, and constrain the other servants, workmen, and laborers, whether working on said works by night or by day, against their own free will and good judgment, also to commit a breach of the said contract of service at one and the same time, that is to say, to refuse to do the necessary work and labor required to be done as aforesaid, for the purpose of manufacturing and supplying gas without interruption as aforesaid, and to leave the said works of the said company suddenly, simultaneously, and without notice, to the great injury of the said company and of the said liege subjects of our lady the queen, and of the said servants, workmen, and laborers of the said company who were

otherwise ready and willing to continue their said contract of service, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

The sixth, seventh, eighth, and ninth counts were for molesting, intimidating, and forcing W. L. and others to leave the service of the G. Co., and were given up by the prosecution upon the suggestion of the learned judge in the course of the trial.(k)

(657b) *Conspiracy to obstruct workmen in their calling.*

First count.

That (the defendants), unlawfully, wickedly, and unjustly devising, contriving, and intending to injure and aggrieve (the prosecutors), and to obstruct them in the pursuit of their lawful calling and business, unlawfully did, on, etc., within, etc., conspire, etc., to molest and obstruct (the prosecutors), then being master cabinetmakers and furniture manufacturers, in their lawful calling, by watching and besetting the house where the said prosecutors carried on business, situate, etc., with a view to coerce the prosecutors to dismiss and cease to employ divers workmen, to wit, etc., against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That (the defendants), unlawfully, etc., contriving and intending to injure and aggrieve the workmen then being employed by (the prosecutors), and to obstruct them in the pursuit of their lawful calling, unlawfully, etc., did conspire, etc., to molest and obstruct [*names of workmen*] and other workmen in their lawful calling, by watching and besetting the house and place of business, situate, etc., wherein (the prosecutors) then carried on their business, and where the said workmen then happened to be, with a view to coerce the said [*names*] and other workmen, and to induce them to quit their said employment.(l) (*Conclude as in book 1, chapter 3.*)

(k) A conviction was sustained on this indictment in *R. v. Bann*, 12 Cox, C. C. 316.

(l) Sustained in *R. v. Hibbert et al.* 13 Cox, C. C. 82.

(658) *Conspiracy by parties engaged on the public works to increase the rate of passage money and freight.*(m)

That A., late of, etc., canal transporter, B., late of, etc., canal transporter, C., late of, etc., canal transporter, D., late of, etc.,

(m) This form, for which I am indebted to Mr. Magraw, then prosecuting attorney in the city of Pittsburg, was prepared by eminent counsel in that city, and was held sufficient to support a conviction. The question of the indictability of the offence was examined by Judge Grier, then presiding in the Pittsburg common pleas, and afterwards of the supreme court of the United States, on a preliminary hearing.

"The defendants pray to be discharged," he said, "on the ground that they have been imprisoned contrary to law, or, in other words, that the charge on which they are committed is not indictable, and not an offence known to the law. It is admitted that the commitment states that it is for a 'conspiracy and unlawful combining,' etc.; but it is contended that the oath on which the commitment is founded does not set forth any such offence. If this be so, the defendants should be discharged. For by the constitution of the state, no warrant can issue to seize any person, without probable cause supported by oath or affirmation. We are therefore bound, in justice to the prisoners, to examine whether the oath on which the commitments are founded shows 'probable cause,' or, in other words, whether it states any offence known to the law, for which the defendants are criminally liable.

"The affidavit states that the defendants, being engaged in the business of carriers and transporters of merchandise on the Pennsylvania canal, on the 17th day of December, 1841, and intending to unite themselves into a board and combination, to regulate the price of transportation of merchandise on said canal, did assemble and meet together, and did then and there agree upon and adopt, and severally swear to observe, a certain preamble and constitution (of which a copy is annexed), for their regulation as carriers and transporters, etc.

"The paper referred to as containing this unlawful combination or conspiracy is entitled, 'The Preamble and Constitution adopted by the Board of Canal Transporters, at Pittsburg, 1841.'

"It is signed by the prisoners and others, and sworn to in the following words:—

"We, the subscribers, do severally swear or affirm, that we will, to the best of our abilities and understanding, carry out the views of the foregoing instrument, to which our names are attached, in sincerity and good faith."

"This constitution, as it is called, embraces no less than twelve sections or articles, each of considerable length; a brief outline of some of its provisions it will be necessary to state, in order to understand its meaning and effect:—

"1. The board is to consist of ten proprietors and agents, who are conducting the business of the several lines (of transportation) at Pittsburg, whose names are annexed, etc.

"2. To have a president and secretary.

"3. The board shall fix the time for the delivery of goods at their destination, and the rates of freight on all goods going eastward, etc., and no member of the board shall be allowed to forward freight at a less rate or shorter time than that agreed on previously, and fixed by the board.

"4. Each line to furnish weekly or monthly accounts of the amount of freight shipped, prices charged, etc., *under oath*, and in the event of any line being out of freight, a fund to be formed, by the payment of seven per cent. on all freights, to be divided into nine shares, and each line to draw one-ninth without regard to the amount put in by said line.

canal transporter, E., late of, etc., canal transporter, F., late of, etc., canal transporter, G., late of, etc., canal transporter, H., late

"5. Lines violating the constitution to forfeit their share of the fund.

"6. Clerks of the funds to have no business connections with mercantile houses for the purpose of securing *freight, influence, or patronage.*

"7. No line to have a freight agent, etc., nor shall any person be allowed to receipt, agree, or contract to forward goods on any other terms than those set forth (in that article).

"8. No member to pay a bonus for freight, etc., or propose to sell produce free of commission, or carry packages or passengers with a view to lessen the cost of freight nor take currency in payment of freight, without exacting the regular discount in addition to the full account of freight; and any arrangement or contract for freight that will in any way reduce the amount below the regular established rate, shall be considered a direct violation of the constitution.

"9. Sets forth the mode of proceeding when any one is *suspected* of violating the constitution.

"10. No freight to be brought west at lower prices than those established.

"11. Members may withdraw on two weeks' notice.

"12. Each line to produce at every meeting an affidavit in the following form: 'I, A. B., do solemnly swear that since the last regular meeting of the board I have not, in any manner, shape, or form, directly or indirectly, violated the intent, meaning, or spirit of the constitution, as agreed upon by the agents of the lines stationed at Pittsburg, and that the annexed list is a correct return of freight,' etc.

"This constitution (as it is called), or articles of confederation (as they might be called), appear to have been drawn with considerable care, and whatever its object or intention may be, is guarded with unusual sanctions to increase its stringency.

"The objects of the confederation are plainly stated, and its consequences and effects upon the community are obvious to the most careless observers.

"It is nothing less than a combination between the chief capitalists and carriers on this line of our public works to raise or depress the rate of freight, as it may suit their own interests, either to increase their profits or crush a competitor.

"Does such a combination come within the description of those which are punishable by indictment as conspiracies at common law? On this subject it would be useless to notice the various and confused dicta of what is necessary to constitute the offence, as there is no subject in the whole range of criminal jurisprudence so uncertain and unsettled in its definitions and principles. But so far as they have any application to the present case, they are lucidly and correctly stated by Chief Justice Gibson, in the case of *Com. v. Carlisle* (*Journal of Jurisprudence*, 225). 'I take it, then' (says the chief justice), 'a combination is criminal whenever the act to be done has a necessary tendency to prejudice the public, or to oppress individuals by unjustly subjecting them to the power of the confederates, and giving effect to the purposes of the latter, whether of extortion or mischief.' According to this view of the law, a combination of employers to depress the wages of journeymen below what they would be if there were no recurrence to artificial means, is criminal. So, also, Chief Justice Savage, in *People v. Fisher* (14 Wend. 9), observes: 'It is important to the best interest of society that the price of labor be left to regulate itself, or rather to be limited by the demand for it. Combinations and confederacies to *enhance* or *reduce* the prices of labor, or of any articles of trade or commerce, are injurious. They may be oppressive by compelling the public to give more for an article of necessity or convenience than it is worth: or, on the other hand, of compelling the labor of the mechanic for less than its value. Without any officious or improper interference on the subject, the price of

of, etc., canal transporter, and I., late of, etc., canal transporter, being engaged in the carriage for hire of goods, wares, and merchandise on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the cities of Philadelphia and Pittsburg, in said commonwealth, and not being content with the usual rates and prices for which they and others were accustomed to work and labor in the said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, to counteract the effect of free competition on the speed and price of transportation, and thereby to exact and procure great sums of money from the citizens of this commonwealth, and from all others having goods, wares, or merchandise to be transported on said canal and railways, did, on, etc., with force and arms, at, etc., combine, conspire, confederate, and unlawfully agree together, and did enter into a written compact signed and sworn to by them, and entitled, "Preamble and Constitution adopted by the Board of Canal Transporters at Pittsburg," whereby it was, amongst other things, provided, that said board should consist of the proprietors and agents who are conducting the business of the several lines at Pittsburg, whose names are thereunto annexed. And by the said preamble and constitution it was provided, that "the board shall fix the time for the delivery of goods at their destination, and the rates of freight on all goods going eastward, such rates affording a fair remuneration to the trans-

labor, or the wages of mechanics, will be regulated by the demand for the manufactured article, and the value of that which is paid for it; but the right does not exist either to enhance the price of the article or the wages of the mechanic by any forced and artificial means. The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular reward."

"The one may refuse to sell, and the other to work, except on his own terms, but he has no right to say that another shall not exercise the same liberty.

"There is," says C. J. Gibson, "between the different parts of the body politic a reciprocity of action, which, like the antagonizing muscles in the natural body, not only prescribes to each its appropriate state and condition, but regulates the motion of the whole. The efforts of an individual to disturb the equilibrium can never be perceptible, but the increase of power by the combination of means, being in geometrical proportion to the number concerned, an association may be able to give an impulse, not only oppressive to individuals, but mischievous to the public at large; and it is the employment of an engine so dangerous and powerful that gives criminality to an act that would be perfectly innocent, at least in a legal view, when done by an individual.'" On this topic see Wh. Cr. L. 8th ed. §§ 1366-9.

porter, without imposing any oppressive rate on the public; and no member of this board, proprietor, agent, clerk, or any other person shall, by agreement or otherwise, either directly or indirectly, forward, or offer to forward, freight of any description, at a less rate or shorter time than that agreed on previously, and fixed by the board;" and in another part of the same preamble and constitution, it was declared that any "arrangement or contract for freight, that will in any way reduce the amount below the regular established rate, shall be considered a direct violation of the constitution;" and the said preamble and constitution provided that "no proprietor, agent, clerk, or any person for them, shall make contracts for goods coming westward at any rate or rates less than those established at the place of shipment, and recognized and agreed on by the partners of the several transportation companies herein concerned;" which said combination, so as aforesaid entered into, is of grievous prejudice to the common and public good and welfare, of evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said A., B., C., D., E., F., G., H., and I., being engaged in the carriage for hire of goods, wares, and merchandise on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the cities of Philadelphia and Pittsburg, in said commonwealth, and not being content with the usual rates and prices for which they and others were accustomed to work and labor in the said business and occupation, but contriving and intending unjustly and oppressively to increase and augment the said rates and prices, to counteract the effect of free competition on the speed and price of transportation, and thereby to exact and procure great sums of money from the citizens of this commonwealth, and from all others having goods, wares, or merchandise to be transported on said canal, did, on the day and year aforesaid, combine, conspire, confederate, and unlawfully agree together, and did enter into a written compact, signed and sworn to by them, and entitled "Preamble and Constitution adopted by the Board of Canal Transporters at Pittsburg," whereby it was, amongst other things, provided, that said board should consist of the proprietors and

agents who are conducting the business of the several lines at Pittsburg, whose names are thereunto annexed, and, by the said preamble and constitution, it was provided, that "the board shall fix the time for the delivery of goods at their destination, and the rates of freight on all goods going eastward, such rates affording a fair remuneration to the transporters, without imposing any oppressive rate on the public; and no member of this board, proprietor, agent, clerk, or any other person, shall, by agreement or otherwise, either directly or indirectly, forward, or offer to forward, freight of any description at a less rate, or shorter time, than that agreed on previously, and fixed by the board;" and, in another part of the same preamble and constitution, it was declared that "any arrangement or contract for freight that will in any way reduce the amount below the regular established rate shall be considered a direct violation of the constitution;" and the preamble and constitution provided that "no proprietor, agent, clerk, or any person for them, shall make contracts for goods coming westward at any rate or rates less than those established at the place of shipment, and recognized and agreed on by the partners of the several transportation companies herein concerned;" and the said A., B., C., D., E., F., G., H., and I., in pursuance of the said unlawful conspiracy, combination, and agreement, did refuse, and for a long time continued to refuse, to work and labor in the business and occupation aforesaid, except at the rates and prices fixed and established by the aforesaid board; which said conspiracy, so as aforesaid carried into execution, is of grievous prejudice to the common and public good and welfare, of evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

That the said A., B., C., D., E., F., G., H., and I., being engaged in the carriage for hire of goods, wares, and merchandise on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the cities of Philadelphia and Pittsburg, in said commonwealth, and not being content with the usual rates and prices for which they and others were accustomed to work and labor in the said business and occupation, but contriving and intending unjustly and op-

pressively to increase and augment said rates and prices, to counteract the effect of free competition on the speed and price of transportation, and thereby to exact and procure great sums of money from the citizens of this commonwealth, and from all others having goods, wares, or merchandise to be transported on the said canal and railways, did, on the day and year aforesaid, combine, conspire, confederate, and unlawfully agree together to raise and keep up the prices and rates of transportation as aforesaid; to the grievous prejudice of the common and public good and welfare, of evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

That the said A., B., C, D., E., F., G., H., and I., being canal transporters as aforesaid, and designing and intending to form and unite themselves into an unlawful club and combination, and to make and ordain unlawful and arbitrary rules and orders amongst themselves, and thereby to govern themselves in their said business as canal transporters, and unlawfully and unjustly to exact and extort great sums of money by means thereof, on the day and year aforesaid, with force and arms, at the county aforesaid, did unlawfully assemble and meet together, and being so met together did then and there unjustly and corruptly combine, conspire, confederate, and agree that none of them, the said conspirators, would thereafter transport or carry any goods, wares, merchandise, or other freight on the Pennsylvania canal, and the several railways connected therewith, forming a line of communication between the cities of Philadelphia and Pittsburgh, at a less rate, or in a shorter time than should have been previously fixed, agreed upon, and allowed by the said conspirators; to the great prejudice of the common and public good and welfare, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(659) *Conspiracy to charge a man with a crime.*(*n*)

That J. S., late of, etc., laborer, and A., his wife, and J. W.,

(*n*) This is taken from Archbold's C. P. 5th Am. ed. 672. See for conspiracy to charge a man with forgery, 4 Went. 86; capital offence generally, *infra*, 671; sodomy, C. Cir. Com. 126, *infra*, 662; larceny, C. Cir. Com. 135; 3 Burr. 1320; receiving stolen goods, C. Cir. Com. 225; *infra*, 661; poisoning horses, 4 Went. 98.

late of, etc., carpenter, and E. W., late of, etc., laborer, being evil disposed persons, and wickedly devising and intending not only to deprive one J. N. of his good name, fame, credit, and reputation, but also to subject him, as far as in them lay, to the pains and penalties by the laws of this kingdom made and provided against and inflicted upon persons guilty of (rape), on, etc., with force and arms, at, etc., did amongst themselves conspire, combine, confederate, and agree together falsely to charge and accuse the said J. N., that he the said J. N. had then lately before (feloniously ravished and carnally known the said A., violently and against her will and consent). That the said J. S. and A. his wife, and J. W. and E. W., afterwards, to wit, on, etc., at, etc., in pursuance of, and according to the said conspiracy, combination, confederacy, and agreement amongst themselves had as aforesaid (*here set out the overt acts as in precedents above; see ante, form (608); introducing the second and each of the subsequent acts thus*): That in further pursuance of, and according to the said conspiracy, combination, confederacy, and agreement amongst them, the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, they the said, etc., on, etc., at, etc.,* (*continuing the indictment from the above asterisk, as thus*): falsely and unlawfully, in the presence and hearing of divers persons, did charge and accuse the said J. N. with and of the rape aforesaid. That in further pursuance of, and according to the said conspiracy, combination, confederacy, and agreement amongst them the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, she the said A. afterwards, to wit, the day and year aforesaid, at the parish aforesaid, in the county aforesaid, did upon her oath falsely charge and accuse the said J. N. before A. C., Esq., then and yet being one of the justices of, etc., in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county, that he the said J. N. had then lately before feloniously ravished and carnally known her, the said A., violently and against her will and consent. That in further pursuance of, and according to the said conspiracy, combination, confederacy, and agreement amongst them, the said J. S. and A. his wife, and J. W. and E. W., had as aforesaid, she the said A., by the name of A. the wife of J. S., afterwards, to wit, at the general quar-

ter sessions of the peace of our said lady the queen, holden at the new sessions house, on Clerkenwell Green, in and for the county of Middlesex aforesaid, on, etc., before A. B. and C. D., Esqrs., and others their associates, justices of our said lady the queen, assigned to keep the peace of our said lady the queen, in and for the county aforesaid, and also to hear and determine divers felonies, trepasses, and other misdeeds committed in the said county, did falsely exhibit a certain bill, commonly called a bill of indictment, against the said J. N., by the name and addition of J. N., late of the parish of C., in the county of M., yeoman, to P. C., Esq. (*here insert the names of the grand jurors to whom the indictment for rape was exhibited*), good and lawful men of the said county, then and there sworn and charged to inquire for, etc., for the body of the said county; which said bill was by the said jurors then and there returned into the said court, before the justices of, etc., last aforesaid, and others their fellows aforesaid, thus indorsed: "Not found;" which said bill is in these words, that is to say (*here set out the indictment verbatim, and you may then add, "with intent to obtain and acquire to them the said J. S. and A. his wife, and the said J. W. and E. W., of and from the said J. N., divers sums of money for compounding the said pretended felony and rape so falsely charged upon the said J. N. as aforesaid;" if this be the fact, and that there will be no difficulty in proving it*); to the great damage, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(660) *Conspiracy to charge a man with receiving stolen goods, knowing them to be stolen, and obtaining money for compounding the same.*(o)

The jurors, etc., upon their oath present, that A. B. and C. D., both of, etc., laborers, wickedly and maliciously devising and in-

(o) Davis's Prec. 100.

In *Com. v. Tibbetts*, 2 Mass. 536, an indictment of a character very similar to this was sustained. There were, it is true, several additional overt acts, but, as they were imperfectly set out, they were discharged by the court as surplusage.

When the object of the combination is to indict the prosecutor, it is not necessary to show with what particular offence it was intended to charge him, but it will suffice to say that they conspired to indict him of a crime punishable by the laws of the country, and then it may be alleged that they, according to the conspiracy, did falsely indict him (*R. v. Spragge*, 2 Burr. 993), nor is it necessary

tending one E. F. unjustly to deprive of his good name and character, and also fraudulently to obtain and acquire to themselves, of and from the said E. F., divers sums of money, on, etc., at, etc., in the county aforesaid, did wickedly, fraudulently, and maliciously conspire, combine, confederate, and agree among themselves falsely to charge and accuse, and, in pursuance of said conspiracy, combination, confederacy, and agreement, did then and there falsely charge and accuse the said E. F., that he had then lately before received certain stolen goods, which had then lately before been feloniously stolen, taken, and carried away, knowing them to be stolen; and that they the said A. B. and C. D., by divers threats and menaces of them the said A. B. and C. D., made and uttered in pursuance of the said conspiracy, combination, confederacy, and agreement aforesaid, so as aforesaid had between them the said A. B. and C. D., that the said E. F. should be prosecuted and punished as a receiver of stolen goods, knowing them to be stolen, afterwards, to wit, on the said day of in the year aforesaid, at B. aforesaid, in the county aforesaid, did demand, receive, and take the sum of fifty dollars of him the said E. F., for and as a composition of an agreement not to prosecute the said pretended offence, and to discharge him the said E. F. from all further prosecution for the same, etc.

(661) *Conspiracy to charge a man with receiving stolen goods, and thereby obtaining money for compounding the same, and causing him to lay out a sum of money for the entertainment of the conspirators at one of their houses.*(p)

That A. B., late of, etc., gentleman, and C. D., late of, etc., laborer, being ill-disposed persons, and wickedly devising and intending one M. N. not only of his credit and good reputation unjustly to deprive, but also to obtain and acquire to themselves, of and from the said M. N., divers large sums of money, on, etc., with force and arms, at, etc., * did amongst themselves conspire, combine, confederate, and agree falsely to charge and accuse the

to aver that the man is innocent of the offence (*R. v. Kinnersley*, 1 Str. 103), for he shall be presumed to be innocent until the contrary appear. See *R. v. Best*, 1 Salk. 174; *R. v. Sprague*, 2 Burr. 993. *Infra*, 671.

(p) Stark. C. P. 468.

said M. N. with having lately before then received stolen goods. And, etc., that the said A. and C., afterwards, on, etc., according to the said conspiracy, combination, confederacy, and agreement between themselves before had as aforesaid, falsely, wickedly, and for the sake of lucre and gain, did, in the presence and hearing of divers persons, charge and accuse him the said M. N., that he the said M. N. had bought hats that were stolen, knowing them to have been stolen, and that they the said A. B. and C. D. did then and there falsely pretend and affirm to the said M. N. that a bill of indictment has been found at the general session of the peace, holden at the quarter sessions in and for the said county, on, etc., then last, against the said M. N. for receiving stolen goods, knowing the same to have been stolen; whereas, in truth and in fact, there was not at the time of such charge and accusation, nor at any time before or since, any bill or bills of indictment whatsoever in any manner found against the said M. N., for the said supposed offence so falsely charged upon him, or for any such like crime; and whereas, in truth and in fact, the said M. N. was never guilty of the said supposed offence, or any other offence of that kind.

And the jurors aforesaid, upon their oath aforesaid, do further present, that by the said false accusations, and by divers threats, menaces, and allegations of them the said A. B. and C. D., then and there uttered and made, that he the said M. N. should be transported into parts beyond the seas for the said pretended offence, they the said A. B. and C. D. did then and there demand, receive, and take of the said M. N. one piece of gold coin, of the proper coin of this realm, called a guinea, for and as a compensation and agreement of the said pretended offence, and to discharge the said M. N. from all further prosecution of the same; and they the said A. B. and C. D. did also then and there, by the false and wicked pretences aforesaid, unlawfully cause and procure the said M. N. to expend and lay out, and the said M. N. did expend and lay out twenty-three shillings, of lawful money of Great Britain, at the dwelling-house of the said A. B., in wine and other liquors, in the company and for the entertainment of them the said A. B. and C. D., to the great damage, infamy, and disgrace of the said M. N., and against, etc. (*Conclude as in book 1, chapter 3.*)

(662) *Conspiracy to charge a man with an unnatural crime, and thereby to obtain money.(q)*

(Commencement as in the last precedent to the*.) Did amongst themselves conspire, combine, confederate, and agree falsely to charge and accuse the said M. N., that he the said M. N. then lately before had committed the crime of sodomy, commonly called buggery, with him the said A. B. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. B. and C. D. afterwards, to wit, on, etc., at, etc., according to the conspiracy, combination, confederacy, and agreement between them as aforesaid had, falsely, unlawfully, and wickedly did charge and accuse the said M. N., that he the said M. N. then lately before had committed the crime of sodomy, commonly called buggery, with him the said A. B.; whereas, in truth and in fact, the said M. N. was never guilty of the said crime, or of any crime of the like nature; and that they the said A. B. and C. D., in pursuance of, and according to the conspiracy, combination, confederacy, and agreement between them as aforesaid had, afterwards, to wit, on, etc., at, etc., unlawfully, wickedly, and unjustly did obtain, acquire, and get into their hands and possession the sum of five pounds, of lawful money of Great Britain, of the moneys of the said M. N., of and from the said M. N., under the aforesaid false color and pretence, and also under color and pretence of concealing the said supposed crime, and for not prosecuting the said M. N. for the same, to the great damage of the said M. N., against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said A. B. and C. D., on, etc., with force and arms, at, etc., wickedly, unlawfully, and for lucre and gain sake, did threaten the said M. N., that unless he the said M. N. would give them, the said A. B. and C. D., five pounds, they the said A. B. and C. D. would swear sodomy (meaning the detestable crime of sodomy, called buggery) against him the said M. N.; whereas, in truth and in fact, the said M. N. was never guilty of

(q) Stark. C. P. 469.

the crime of sodomy, or of any such crime. And that the said A. B. and C. D. afterwards, to wit, on the same day and year aforesaid, at the parish aforesaid, in the county aforesaid, by means of the threatening aforesaid, unlawfully, wickedly, and injuriously did obtain, acquire, and get to themselves, of and from the said M. N., five pounds of lawful money of Great Britain, of the moneys of the said M. N. (*Conclude as in book 1, chapter 3.*)

(663) *Conspiracy to extort money generally by criminal prosecution. First count, charging a conspiracy to extort, by commencing and continuing a prosecution.(r)*

That the defendants, intending unlawfully, fraudulently, and deceitfully to extort, obtain, and procure of and from the prosecutor a large sum of money for their own use, on, etc., at, etc., did corruptly and unlawfully conspire together to extort, obtain, and procure of and from the prosecutor, a large sum of money for their use, and in order to extort, obtain, and procure the same, did corruptly and unlawfully conspire to indict the prosecutor for having kept a common gaming-house, etc. That defendants, in furtherance of their conspiracy, afterwards, to wit, on, etc., at, etc., at the quarter sessions, etc., did falsely exhibit, and cause to be exhibited, a certain bill of indictment against the prosecutor, and afterwards, in pursuance, etc., did corruptly, wilfully, and wickedly procure and cause the said bill of indict-

(r) *R. v. Hollingberry*, 6 D. & R. 345. Motion for a new trial and in arrest of judgment, was refused after a conviction.

Abbott, C. J.—“The indictment, in my opinion, most clearly charges a legal offence, and an attempt to commit it by illegal means. I consider the very term ‘extort’ necessarily to imply the adoption of illegal means; the third count, therefore, is undoubtedly good, because that states only that the defendants unlawfully conspired to extort money from the prosecutor by offering to suppress an indictment pending against him, if he would give them a sum of money as a consideration for so doing. The first two counts certainly charge that the defendants conspired falsely to exhibit indictments against the prosecutor. If that must be construed to mean that they conspired to exhibit false indictments against him, there is a variance, because the jury have expressly found that the indictments were not false. But, as it seems to me, that allegation may fairly be construed to mean, and I believe that it really did mean, that the defendants falsely exhibited the indictments; that is, exhibited them not for the purpose of justice, but for false and wicked purposes of their own; which, whether true or not, is an immaterial allegation, because the question was, whether they exhibited them illegally with an illegal intent, and for an illegal purpose, which the jury, after full consideration, have found that they did.”

ment to be returned a true bill, and that defendants, in further pursuance, etc., afterwards, to wit, on, etc., at, etc., in the court of king's bench, did falsely exhibit, and cause to be exhibited, a certain bill of indictment against the prosecutor, and did afterwards, in pursuance, etc., corruptly, wilfully, and wickedly procure and cause the said bill of indictment to be returned a true bill. That the defendants, in pursuance, etc., afterwards, to wit, on, etc., at, etc., did unlawfully and wilfully endeavor to obtain and procure of and from the prosecutor a large sum of money, as and for a consideration or recompense to them for compromising and suppressing the said indictments, and giving up the further prosecution thereof.

(664) *Second count. Charging a prosecution already commenced, and a conspiracy to extort money by proposing to suppress it.*

The defendants preferred an indictment at the quarter sessions against the prosecutor for keeping a common gaming-house, which being removed into the court of king's bench, and depending there, defendants did unlawfully and wickedly conspire to extort, etc., of and from the prosecutor, a large sum of money, and in pursuance, etc., did unlawfully propose to the prosecutor to suppress the indictment, and to withhold certain evidence which they had and could bring forward to prove that the prosecutor had unlawfully kept a common gaming-house, if he would give and pay to them a large sum of money for their use, etc.

(665) *Third count. Charging a conspiracy to extort by promising to compromise a then pending prosecution.*

That defendants, wickedly intending to extort, etc., of and from the prosecutor, divers large sums of money, did unlawfully and wickedly conspire to extort, obtain, and procure of and from the prosecutor divers large sums of money, and, in pursuance of their conspiracy, did propose to compromise and suppress a certain indictment before preferred against the prosecutor by defendant B., and then pending in the court of king's bench, and a certain other indictment before preferred against the prosecutor by defendant S., then also pending in the court of king's bench, and to prevent further proceedings being taken against the prosecutor thereon, if the prosecutor would give and pay to defendants

a large sum of money, as a consideration and recompense to them for compromising and suppressing the last mentioned indictments, and preventing any further proceedings being taken against the prosecutor thereon, etc.(s)

(666) *Conspiracy to impoverish the prosecutor, and hinder him from exercising his lawful trade as a tailor; with an overt act, setting forth the consummation of the conspiracy.(t)*

That F. E. and six others, devising and intending unjustly, unlawfully, and by indirect means to impoverish one H. B., and to reduce to beggary and want the said H. B., and to hinder and deprive the said H. B. from using and exercising his trade and business as a tailor, which he then and there used and exercised, on, etc., at, etc., wrongfully, fraudulently, maliciously, and unlawfully did confederate, conspire, combine, and agree amongst

(s) This form is given merely in skeleton, and can only be of use as such.

(t) On this count there was a verdict of guilty in *R. v. Eccles*, 3 Dougl. 337. (Reported also in 1 Leach, 276, and 13 East, 230, n.; cf. Wh. Cr. L. 8th ed. §§ 1349, 1352.) The indictment contained another count not materially different, and, according to the report in Douglas, was thus disposed of: Chambre moved an arrest of judgment on two grounds—1. The charge is too general. *Hawk. b. 2, c. 26, s. 59*; *The King v. How, B. R., E.*; 12 Geo. I.; 1 Str. 699; *The King v. Munot, B. R., H.*; 13 Geo. I.; 2 Str. 1127; 14 Vin. 386. (Willes, J., referred to *The King v. Kinnersly, B. R., T.*; 5 Geo. I.; 1 Str. 193.) It must be a conspiracy to do something. (Buller, J.: “Here the act intended is stated.”) It is only the consequence and not the means that is stated. (Lord Mansfield: “Be the means what they may, if it be in consequence of a conspiracy, it is criminal.”) The issue, it was argued, is not well joined, for it does not appear that any of the defendants but Eccles have pleaded.

Lord Mansfield.—“The conspiracy is to prevent Booth from working; the consequence is poverty. But the conspiracy and consequence are stated; but it is objected that there is no allegation of the means. Such allegation is unnecessary. The latter cases, and especially *The King v. Kinnersly*, are very strong. As to the objection on the issue, the record goes on and says, ‘they and each of them.’”

Buller, J.—“The indictment says more than is sufficient in alleging that the defendants conspired ‘by indirect means.’ The means are matters of evidence. If the indictment had stated that they conspired to prevent Booth from carrying on his trade, it would have been sufficient; ‘by indirect means’ is surplusage.

“As to the issue, it does not appear by this record that any of the defendants let judgment go by default. Therefore the court cannot go into the matter, and the issue is joined, though in a very slovenly manner. If any of the defendants have in fact let judgment go by default, and are injured by this manner of entering the issue, they have their remedy against the clerk in the crown office.”

Motion denied.

But this case is no longer law so far as it involves the position that a conspiracy to impoverish another is indictable. *R. v. Rowlands*, 2 Den. C. C. 364; 5 Cox C. C. 460, 468; 17 Q. B. 671.

themselves by indirect means to impoverish the said H. B., and to deprive and hinder him from following and exercising his aforesaid trade or business of a tailor; and the said F. E., etc., in pursuance of, and according to the unlawful conspiracy, combination, and agreement aforesaid, on, etc., at, etc., indirectly, wrongfully, unlawfully, maliciously, and unjustly did prevent and hinder the said H. B. from following his aforesaid trade or business in Liverpool aforesaid, and thereby did then and there greatly impoverish the said H. B., to the great damage, etc.

(667) *Conspiracy to defame a public officer. First count, conspiracy to defame by charging corrupt conduct.*(u)

That A. B., etc., together with other evil disposed persons whose names to the said inquest are as yet unknown, on, etc., at, etc., wickedly and maliciously devising and intending to bring contempt, discredit, and dishonor on the administration of public justice, etc., and to deprive C. D., Esq., then and there holding the office and exercising the duties (*setting forth the office*), of his good name, fame, and reputation, as well as unjustly to subject him the said C. D. to pains and penalties, did among themselves conspire, combine, confederate, and agree together to vilify and defame the said C. D., and falsely and maliciously to charge and accuse him the said C. D. with having been guilty of great corruption and other misdemeanors in his said office, and with having at divers times in his said office, and in the exercise of the said duties, corruptly, unlawfully, and wickedly received divers large bribes and sums of money, and other valuable things, and with having, in consideration of such bribes, moneys, and other valuable things, unlawfully, corruptly, and wickedly retarded, checked, prevented, falsified, and frustrated the due course of public justice of the said commonwealth in the said city and county, to the great damage, disgrace, and infamy of the said C. D., to the great discredit and dishonor of the administration of public justice as aforesaid, and against, etc. (*Conclude as in book 1, chapter 3.*)

(u) *Com. v. Strafford*, Sup. Ct. Pa., Dec. T. 1845, No. 39.

(668) *Second count. Same as first, setting out the matter charged.*

That the said A. B., on the day and year aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, together with divers other evil disposed persons whose names are to this inquest as yet unknown, wickedly and maliciously with them devising and intending to bring contempt, discredit, and dishonor on the administration of public justice in the said city and county, as well as to deprive the said C. D., Esq., holding the office and exercising the duties hereinbefore specified, of his good name, fame, and reputation, as well as unjustly to subject him the said C. D. to high pains and penalties, did among themselves conspire, combine, confederate, and agree together falsely to charge and accuse the said C. D., Esq., then in the office and in the exercise of the duties hereinbefore specified, with having, in a case then shortly before pending, to wit, etc. (*here state the matter charged*); to the great damage, infamy, and disgrace of the said C. D., to the great discredit and dishonor of the administration of public justice as aforesaid, and against, etc. (*Conclude as in book 1, chapter 3.*)

(669) *Third count. By charging the prosecutor with having been guilty of corruption in a particular case.*

That the said A. B., on the day and year aforesaid, at the county aforesaid, and within the jurisdiction aforesaid, together with divers other evil disposed persons whose names are to this inquest as yet unknown, wickedly and maliciously with them devising and intending to bring contempt, discredit, and dishonor on the administration of public justice in the said city and county, as well as to deprive C. D., holding the office and exercising the duties hereinbefore specified, of his good name, fame, and reputation, as well as unjustly to subject the said C. D. to high pains and penalties, did among themselves conspire, combine, confederate, and agree together falsely to charge and accuse the said C. D., when in the office and in the exercise of the duties hereinbefore specified, with having, in a case then shortly before pending, to wit, a case in which one K. was defendant, corruptly, wickedly, and unlawfully received a large sum of money as a bribe, to wit, the sum of seventy-five dollars; to the great dam-

age, infamy, and disgrace of the said C. D., to the great discredit and dishonor of the administration of public justice as aforesaid, and against, etc. (*Conclude as in book 1, chapter 3.*)

(670) *Conspiring to defeat public justice, by giving false evidence and suppressing facts on a charge of felony.(v)*

That before commission of the offence by W. C. and R. C., hereinafter mentioned to have been committed by them, one F. S. had been charged before J. T., Esquire, one of the magistrates of the police courts of the metropolis, sitting at the police court, Greenwich, in the county of Kent, and within the metropolitan police district, on suspicion of having committed a certain felony, to wit, of having feloniously broken and entered the dwelling-house of one J. M., and stolen therein divers goods, chattels, and moneys of the said J. M. And the jurors aforesaid, upon their oath aforesaid, do further present, that at the time of the commission of the offence hereinafter alleged to have been committed by the said W. C. and R. C., to wit, on the thirtieth day of September, in the year of our Lord at the parish of Greenwich, in the county of Kent, the said W. C. and R. C. knew and were acquainted with divers matters, facts, circumstances, and things material to be inquired into by the said J. T., as such magistrate as aforesaid, and touching and concerning the said charge and the said subject matter thereof, all and every of which said matters, facts, circumstances, and things it then and there was the duty of the said W. C. and R. C. to make known and reveal to the said J. T., as such magistrate as aforesaid, and which the said W. C. and R. C. were then and there required on her majesty's behalf by the said J. T., as such magistrate as aforesaid, to make known, discover, and reveal to the said J. T., as such magistrate as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said W. C., late of the parish of Greenwich, in the county of Kent, laborer, and R. C., late of the same place, laborer, being evil disposed persons, and contriving and intending as much as in them lay to pervert the due course of law and justice, and not regarding their said duty in that behalf, on the said thirtieth day of September, in the year

aforesaid, at the parish aforesaid, in the county aforesaid, unlawfully did conspire, combine, confederate, and agree together to deceive the said J. T., so being such magistrate as aforesaid, in the premises, and to withhold and conceal from the said J. T. the said matters, facts, circumstances, and things. and falsely to represent to the said J. T., so being such magistrate as aforesaid, that they and each of them the said W. C. and R. C. were ignorant of all the said several matters, facts, circumstances, and things, and falsely to swear before the said J. T., to the effect last aforesaid, and by such false swearing, and divers deceitful, false, and indirect means, ways, and methods, to perfect and put into effect the said wicked conspiracy, combination, confederacy, and agreement, and to procure the said J. T., as such magistrate as aforesaid, to dismiss the said charge, and mutually to aid and assist one another in perfecting and putting in execution the said wicked conspiracy, combination, confederacy, and agreement; to the evil and pernicious example of all other persons in the like case offending, and against the peace, etc.

Second count.

That the said W. C., on the said thirtieth day of September, in the year aforesaid, at the parish of Greenwich aforesaid, in the county of Kent aforesaid, unlawfully did conspire, combine, confederate, and agree together and with divers other persons whose names to the jurors aforesaid are unknown, wilfully and corruptly to give false evidence, and wilfully and corruptly to swear that which was false, upon the examinations upon oath of the said W. C. and R. C., before the said J. T., Esquire, then being one of the magistrates of the police courts of the metropolis, acting at one of the said courts, to wit, at the Greenwich police court, in the county of Kent, touching and concerning a certain charge then depending before the said J. T., to wit, a charge against one F. S., of having feloniously broken and entered a certain dwelling-house of one J. M., and stolen therein divers goods, chattels, and moneys of the said J. M.; to the great and pernicious example of all others in the like case offending, to the manifest perversion of public justice, and against the peace, etc.

(671) *Conspiracy to indict a person for a capital offence, who was acquitted on the trial.*(w)

That J. S., late of, etc., and M. S., late of, etc., being persons of an evil mind and wicked disposition, and devising and intending to deprive one W. G. of his good name, fame, credit, and reputation, and also to subject the said W. G., without any just cause, to the loss of his life and forfeiture of his goods and chattels, lands and tenements, on, etc., at, etc., aforesaid, wickedly and maliciously did conspire, combine, and agree amongst themselves to indict and cause to be indicted the said W. G., for a crime or offence liable by the laws of this kingdom to be punished capitally,(x) and to prosecute the said W. G. upon such indictment. And the jurors, etc., do further present, that the said J. S. and M. S., according to the conspiracy, combination, and agreement aforesaid, between them as aforesaid before had, afterwards, to wit, on, etc., at the session of oyer and terminer of our said lord the king, then holden at New Sarum aforesaid, in and for said county of Wilts, before the honorable Sir R. A., knight, one of the barons of his majesty's court of exchequer, and E. W., Esq., one of his said majesty's serjeants at law, and others their fellows, justices of our said lord the king, assigned by, etc. (*here recite the commission as in the last precedent*), to inquire of all crimes by the oath of N. P., Esq. (*the names of the grand jurors*), good and lawful men of the county aforesaid, then and there sworn and charged to inquire for our said lord the king for the body of the said county, falsely, wickedly, and maliciously, and without any reasonable or probable cause, did indict and cause to be indicted the aforesaid W. G., by the name of W. G., late of, etc., bookseller and stationer, for that, etc. (*here recite the indictment*). And the jurors of this inquisition, on their oaths aforesaid, further present, that the said J. S. and M. S., according to the conspiracy, combination, and agreement between them as aforesaid before had, afterwards, to wit, on the said, etc., and on divers other days and times afterwards, at New

(w) This count was sustained in *R. v. Spragge*, 2 Burr. 993 (see Chit. C. L. 1174), and approved by the supreme court of Alabama in *State v. Cawood*, 2 Stew. 369. See *supra*, 659.

(x) This is sufficient. 2 Burr. 993.

Sarum aforesaid, in the county aforesaid, the said W. G., upon the indictment aforesaid, wickedly and maliciously did prosecute, until the said W. G. afterwards, to wit, at the delivery of the gaol of our said lord the king, of his said county of W., holden at New Sarum aforesaid, on, etc., before the honorable H. L., Esq., one of the barons of his said majesty's court of exchequer, W. H., Esq., serjeant at law, and others their fellows, justices of our said lord the king, duly assigned to deliver his said gaol of the said county of W. of the prisoners therein being, by a certain jury of the county, by due form of law was acquitted of the premises aforesaid in the said indictment above specified, by reason of which said false and malicious prosecutions of the said W. G. by them, the said J. S. and M. S., in form aforesaid, he the said W. G. was compelled to expend divers sums of money, and to undergo divers hardships of body, in his defence to the prosecution aforesaid, to the great damage, disgrace, and infamy of the said W. G., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(672) *Conspiracy to induce a material witness to suppress his testimony.*(y)

The jurors, etc., upon their oath present, that A. B., C. D., and E. F., all of, etc., laborers, being evil disposed persons, and well knowing that a certain bill of indictment for felony was intended and about to be preferred against one G. H., and that one I. J. was a material witness in support of such bill of indictment, on, etc., at, etc., in the county aforesaid, did unlawfully and wickedly conspire, combine, confederate, and agree together to induce the said I. J. to suppress the evidence he knew, and which was within his knowledge touching the said felony, and to withdraw and conceal himself, in order to prevent his being examined as a witness in support of said bill of indictment, so as aforesaid intended to be preferred, against, etc. (*Conclude as in book 1, chapter 3.*)

(673) *Same as last, in another shape.*

The jurors, etc., upon their oath present, that at the time of the

(y) See 3 Chit. C. L. 1156; 1 Salk. 174; 2 Ld. Raym. 1167; Davis's Pree. 109.

conspiracy, combination, confederacy, and agreement hereafter mentioned, one A. B. was a prisoner in the commonwealth's gaol, situated in B., in the county aforesaid, lawfully committed and charged with a certain felony before that time by him committed, and a certain indictment was about to be preferred against him the said A. B. for the said felony, and that one C. D. was a material witness in support of such bill of indictment; and that E. F. and G. H., both of, etc., laborers, well knowing the premises, and contriving and intending to prevent the due course of law and justice, and to prevent the said C. D. from attending as a witness in support of said bill of indictment about to be preferred as aforesaid, on, etc., at, etc., and while the said A. B. was a prisoner in the said prison as last aforesaid for the said felony, wilfully and corruptly did conspire, combine, confederate, and agree among themselves to induce the said C. D. to suppress the evidence he knew concerning said felony and to prevent the said C. D. from attending to give evidence as a witness in support of said bill of indictment against the said A. B., so about to be preferred against him as aforesaid. (*Conclude as in book 1, chapter 3.*)

NUISANCE.

CHAPTER III.

NUISANCE.

- (674) General frame of indictment.

OBSTRUCTIONS TO HIGHWAYS AND WATERCOURSES.

- (675) Erecting a gate across a public highway.
(676) Erecting and continuing a house, part of which was on the highway.
(677) Obstructing a common highway, by placing in it drays.
(678) Same, with filth, etc.
(679) Letting off fireworks in the public street.
(680) Keeping a pond of stagnant water in the city.
(681) Placing a quantity of foul liquor, called "returns," in the highway.
(682) Laying dung near a public street, whereby the air was infected and inhabitants annoyed.
(683) Letting wagons stand in a public street, so as to incommode passengers.
(684) Placing casks in the highway.
(685) Leaving open an area on foot pavement in a street.
(686) Laying dirt in a footway.
(687) Keeping a ferocious dog.
(688) Profane swearing in a public street.
(689) Obstructing townways in Massachusetts, under the stat. of 1786, ch. 66, § 7, and 1786, ch. 81, § 6.
(690) Blocking up the great square of a town-house in Pennsylvania.
(691) Erecting a wooden building on public square of a village in Vermont.
(692) Throwing dirt upon a public lot.
(693) Stopping an ancient watercourse, whereby the water overflowed the adjoining highway, and damaged the same.
(694) Diverting a watercourse running into a public pond or reservoir.
(695) Obstructing a watercourse called "Peg's Run."
(696) Permitting waters of a mill to overflow.
(697) Obstructing an ancient watercourse, whereby a public highway was overflowed and spoiled.
(698) Erecting a dam on a navigable river.
(699) Erecting obstructions on a navigable river.
(700) Obstructing a river which is a public highway, by erecting a fish-trap or snare in it called "putts."
(701) Damming creek.
(702) Obstruction of fish in the river Susquehanna, under the act of 9th March, 1771.

OFFENCES AGAINST SOCIETY.

- (703) Obstructing a harbor by erecting in it piles, etc.
- (704) Negligently permitting fences to remain, during the crop season, less than five feet high, under the North Carolina statute.
[For non-repairing roads, see *infra*, 781, etc.]

UNWHOLESOME SMELLS, ETC.

- (705) General form for nuisance in carrying on unwholesome occupations near to habitations or public highways.
- (706) Carrying on the trade of a trunk-maker near to houses, so as to become a nuisance.
- (707) Erecting a soap manufactory near a highway and dwelling-house.
- (708) Nuisance by deleterious smoke and vapors.
- (709) Nuisance by rendering water unfit to drink.
- (710) Keeping gunpowder in a city.
- (711) Keeping hogs in a city. First count, placing hogs in a certain messuage, etc., and feeding them, so as to generate a stench, etc.
- (712) Second count, keeping hogs near the dwelling-houses of divers citizens, etc., and near the public highways.
- (713) Third count, after averring defendant to be the owner of a large building, etc., charges him with introducing into it great numbers of hogs, etc.
- (714) Boiling bullock's blood for making colors, near the public ways.
- (715) Keeping a distillery near public streets.
- (716) Exposing a child, infected with smallpox, in the public streets.
- (717) Against a parent for not giving his deceased child a proper burial.
- (718) Bringing a horse infected with the glanders into a public place.
- (719) Against owner of land for erecting offensive buildings.
- (720) Keeping a privy in a street.
- (721) Keeping a privy near an adjoining house.

DISORDERLY AND GAMING-HOUSES.

- (722) Disorderly house, etc. Form used in New York.
- (723) Second count. Gaming-houses, etc.
- (724) Disorderly house. Form in use in Massachusetts.
- (724a) Another form.
- (725) Keeping a common bawdy-house in Massachusetts.
- (726) Against keeper of house of ill-fame. Rev. Sts. Mass. ch. 130, § 8; stat. 1849, ch. 84.
- (726a) Same, under Mass. stat. 1855, ch. 405.
- (727) Keeping brothel in Hamilton county, under Ohio statute.
- (728) Keeping disorderly tavern, under Ohio statute.
- (729) Disorderly house. Form used in Philadelphia.
- (730) Second count. Tippling-house.
- (731) Another form for same.
- (732) Disorderly house, under Vermont Rev. Sts. § 9, ch. 99.
- (733) Keeping a disorderly house, and fighting cocks, etc., at common law.

NUISANCE.

- (734) Disorderly house. Form used in South Carolina.
- (734a) Same in Florida by information.
- (735) Letting house to women of ill-fame, at common law.
- (736) Keeping a gaming-house, at common law.
- (737) Second count. Gaming room.
- (738) Keeping a common gaming-house, at common law. Another form, omitting the averment in last of playing rouge et noir.
- (739) Same, the game played being hazard.
- (740) Same, and permitting persons unknown to play at E. O.
- (741) Gaming-house. Form in use in New York.
- (742) Against an innholder, in Massachusetts, for allowing ninepins, etc., to be played on his premises.
- (743) Against same for keeping gaming cocks, under Rev. Sts. ch. 47, § 9.
- (744) Against tavern-keeper for permitting unlawful gaming, in Pennsylvania.
- (745) Against a person in same, for keeping a gambling device called sweat-cloth.
- (746) Second count. Common gaming-house.
- (747) Gambling under Pennsylvania act of 1847. First count, keeping a room for gambling.
- (748) Second count, exhibiting gambling apparatus.
- (749) Third count, aiding persons unknown in keeping a gambling table.
- (750) Fourth count, persuading T. S. to visit a gambling room.
- (751) Against a tavern-keeper for holding near his house a horse-race, under the Pennsylvania statute.
- (752) Masquerade, under Pennsylvania statute of 15th February, 1808.
- (754) Gaming in Alabama. First count, playing at cards.
- (755) Keeping a gaming-table in Alabama.

PROFANATION OF LORD'S DAY.

- (756) Nuisance in an open profanation of the Lord's day, by keeping a shop.
- (757) Keeping shop open, or trafficking on the Sabbath, on Charleston neck.
- (758) Doing business on Sunday against the Massachusetts statute.

UNWHOLESOME MEAT, ETC.

- (759) Selling unwholesome meat. Rev. Sts. of Mass. ch. 171, § 11.
- (760) For adulterating bread for the purpose of sale. Rev. Sts. of Mass. ch. 31, § 12.
- (761) Selling adulterated medicine. Mass. stat. 1853, ch. 394, § 1.
- (762) Selling a diseased cow in a public market.
- (763) Offering putrid meat for sale.
- (764) Another form for the same.

OFFENCES AGAINST SOCIETY.

SCANDALOUS EXHIBITIONS AND INDECENT EXPOSURE.

- (765) Exhibiting scandalous and libellous effigies, and thereby collecting a crowd, etc.
- (765a) Exhibiting indecent performances in a booth.
- (766) Keeping a house in which men and women exhibit themselves naked, etc., as "model artists."
- (767) Bathing publicly near public ways and habitations.
- (768) Public exposure of naked person.
- (768a) Another form.
- (769) Exposing the private parts in an indecent posture.
- (770) Same, under § 8, ch. 444, Vermont Rev. Sts. First count, exposure to divers persons, etc.
- (771) Second count. Exposure in the presence of one Polly P.
- (772) Third count. Exposure in the presence of Polly P. and divers other persons to the jurors unknown.
- (773) Another form for the same in North Carolina, there being no allegation of the presence of lookers on.

LEWDNESS AND DRUNKENNESS.

- (774) Lewdness and lascivious cohabitation in Massachusetts. First count, lascivious behavior by lying in bed openly with a woman.
- (775) Second count. Lascivious behavior, by putting the arms openly about a woman, etc.
- (776) Lascivious cohabitation at common law.
- (777) Lewdness, etc., by a man and woman unlawfully cohabiting and living together.
- (778) Notorious drunkenness.

COMMON SCOLD, NIGHT-WALKER, BARRATOR, ETC.

- (779) Common scold.
- (779a) Night-walker.
- (780) Barratry.

TRAMPS.

- (780a) Under Pennsylvania statute.

NON-REPAIRING OF ROADS.

- (781) Against inhabitants of a township for not repairing a highway situate within the township.
- (782) Against a county for suffering a public bridge to decay.
- (783) Against the inhabitants of a parish for not repairing a common highway.
- (784) Against a corporation of a town for suffering a watercourse which supplied the inhabitants with water, and which they were bound to cleanse, etc., to be filthy and unwholesome.

NUISANCE.

- (785) Information in New Hampshire against a town for refusing to repair, etc.
- (786) Against the inhabitants of a town for not repairing a highway, in Massachusetts.
- (787) Against a supervisor in Pennsylvania for refusing to repair road.
- (788) Against a supervisor in Pennsylvania for refusing to open a road, etc.
- (789) Against overseer in North Carolina for refusing to repair road.
- (790) Against commissioner in South Carolina for refusing to repair road.
- (791) Against overseer in Alabama for same.

VIOLATIONS OF LICENSE LAWS.

- (792) Presuming to be a common seller of wine, under the Maine statute.
- (793) Selling liquors by retail in New Hampshire.
- (794) Dealing in liquor, etc., without license, under § 1, ch. 83, Vermont Rev. Sts.
- (795) Selling liquor by the small, under same.
- (796) Selling liquor, etc., under Massachusetts Rev. Sts. ch. 47, § 1.
- (797) Another form under same section.
- (798) Under Rev. Sts. ch. 47, § 2.
- (799) Another form under same.
- (800) Under Rev. Sts. ch. 47, § 2.
- (801) Another form under same.
- (802) Another form under same.
- (803) Another form, under Rev. Sts. ch. 47, § 2, where defendant is licensed to sell wine, etc.
- (804) Another form under same.
- (805) Another form under same.
- (806) Another form under same.
- (807) Selling liquor without license, under Massachusetts Rev. Sts. ch. 47, § 3.
- (808) Another form under same.
- (809) Another form under same.
- (810) Violation of license laws in Rhode Island.
- (811) Same in New York.
- (812) Same in New Jersey.
- (813) Same in Pennsylvania.
- (814) Another form for same, being that used in Philadelphia.
- (815) Same in Virginia.
- (816) Same in North Carolina.
- (817) Same in Alabama.
- (818) Same in Kentucky.
- (819) Same in Tennessee.
- (820) Same in Mississippi.
- (820a) Selling to person of intemperate habits under Alabama statute.
- (820b) Same in Pennsylvania.

OFFENCES TO DEAD BODIES.

- (821) Digging up and taking away a dead body from a churchyard at common law.
- (822) Removal of dead body, under Massachusetts statute.
- (823) Disinterring dead body, in New Hampshire.
- (824) Removing a body from its grave where there are near relatives, under Ohio statute.
- (825) Same in Indiana.
- (826) Selling the body of a capital convict for dissection, dissection being no part of the sentence.
- (827) Preventing the interment of a dead body by an arrest.

OFFENCES AGAINST THE LOTTERY LAWS.

- (828) Selling lottery tickets. General frame of indictment.
- (829) Same where ticket is lost or destroyed, or in defendant's possession.
- (830) Selling ticket in New Hampshire.
- (831) Same in Massachusetts.
- (832) Advertising lottery ticket in same, under stat. 1825, ch. 184.
- (833) Selling lottery tickets in same, under stat. 1825, ch. 184, § 1.
- (834) Selling ticket in New York.
- (835) Another form for same.
- (836) Promoting lottery in same, being the form in common use.
- (837) Carrying on lottery whose description is unknown to jurors.
- (838) Selling lottery policy in Pennsylvania, under act of March 16, 1847.
- (839) Selling tickets in same, under same.
- (840) Same under repealed act of March 1, 1833. First count, sale of ticket, ticket being set forth.
- (841) Second count. Conspiracy to sell a lottery ticket, etc., the defendant being singly charged with a conspiracy with others unknown.
- (842) Same in Virginia.
- (843) Selling lottery tickets, under Ohio statute.
- (844) Opening up a lottery scheme, called "the Western Reserve Art Union," under Ohio statute.
- (845) Obstructing authorities, under Ohio statute.
- (846) Obstructing authorities and preventing a proclamation at a riot, under Ohio statute.
- (847) Riot and refusing to disperse on proclamation being made, under Ohio statute.
- (848) Publishing scheme of chance, under Ohio statute.

(674) *General form of indictment.*

That A. B., late of, etc., on, etc., and on divers days and times between that day and the taking of this inquisition,(a)

(a) The averment of continuance, if unsupported by evidence, is surplusage. It is introduced, however, in all cases where the nuisance continues, and the object

at, etc., near to the dwelling-houses of divers citizens of, etc., and also to divers public streets of said, etc., did, etc. (*stating the particular offence*), (b) by reason whereof (c) (*state the particular annoyance as in succeeding forms*), (d) to the great damage and common nuisance (e) not only of all the inhabitants of the said

of it is to enable the court to give judgment of abatement. 13 East, 164; 8 T. R. 142; 2 Stra. 686; 3 Chit. C. L. 608. See Wh. Cr. Ev. §§ 138 *et seq.*; Wh. Cr. Pl. & Pr. § 125. See *supra*, vol. i. p. 15.

(b) The indictment must set forth a specific offence. The allegation "common nuisance" is not enough. The nuisance must be described. Wh. Cr. L. 8th ed. § 1428. An indictment for a nuisance in frequenting houses of ill-fame, must charge that "the defendant, knowing the house to be a house of ill-fame, did openly and notoriously haunt and frequent the same." *Brooks v. State*, 2 Yerg. 482. See Wh. Cr. L. 8th ed. § 1428. And an allegation in an indictment, that certain facts charged were "to the common nuisance of all the good citizens of the state," will not make it a good indictment for a common nuisance, unless these facts be of such a nature as may justify that conclusion as one of law as well as of fact. *Com. v. Webb*, 6 Rand. 726; *State v. Baldwin*, 1 Dev. & Bat. 195. Thus, where it was charged that the defendants assembled at a public place, and profanely and with a loud voice cursed, swore, and quarrelled, in the hearing of divers persons then and there assembled, whereby a certain singing-school was broken up and disturbed, *ad commune nocumentum*, it was held that the indictment could not be sustained as one for a common nuisance. *State v. Baldwin*, 1 Dev. & Bat. 195. It is not enough in an indictment for a public nuisance in damming up and stagnating the waters of a creek, whereby the air is corrupted and infected, and sends forth noisome and unwholesome smells, to lay it to the common nuisance of "all the citizens of the commonwealth, not only residing and inhabiting there, but also going, returning, passing, and repassing by the same," nor "to the common nuisance of all the citizens of the commonwealth;" but to maintain a public prosecution for a nuisance, it is necessary to allege and prove that the obstructions placed in the creek, produce a stagnation of the waters, and corrupt the air in or near a public highway, or in some other place in which the public have a special interest. *Com. v. Webb*, 6 Rand. 726. See on the general principle, *People v. Cunningham*, 1 Denio, 524.

(c) See *supra*, vol. i. p. 24.

As to when *scienter* is necessary, see *Stein v. State*, 37 Ala. 123. *Infra*, 716 *et seq.* Ordinarily, however, the allegation is unnecessary, and in any view should only be inserted in an alternative count. Ignorance, or even good intention, is no defence to an indictment for nuisance. Wh. Cr. L. 8th ed. § 1421.

(d) See notes to *supra* form 2; and Wh. Cr. Pl. & Pr. § 125. See also *Wells v. Com.*, 12 Gray (Mass.), 326.

(e) The conclusion must always be "to the common nuisance." Wh. Cr. L. 8th ed. § 1427. Thus an indictment for a nuisance, which ends "to the common nuisance of divers of the commonwealth's citizens," is insufficient. It should be laid, so it has been held in Virginia, to the common nuisance "of all the citizens of the commonwealth, residing in the neighborhood," or "of all citizens, etc., residing, etc., and passing thereby." *Com. v. Faris*, 5 Rand. 691. In Pennsylvania it is admissible to conclude to the common nuisance of the citizens of the commonwealth of Pennsylvania. *Graffin v. Com.*, 3 Penn. R. 502.

Before considering the precedents of indictments for nuisance in obstructing, encroaching on, or annoying the public in using public highways, bridges, harbors, watercourses, or navigable rivers, the general character of the offence will be examined. All permanent obstructions to the passage of the citizens of the

but all other good citizens of the said commonwealth, there (*or if the nuisance be on a highway, say on said highway*)

state over public highways or bridges are nuisances for which an indictment will lie, and it will even be no defence that the highway was opened by an erroneous judgment of the county court. *State v. Spainhour*, 2 Dev. & Bat. 547. Thus, to place logs of timber upon them; to erect a gate across a road without immemorial usage to do so, even if it is kept open; and to suffer a way to be incommoded by trees hanging over it, are indictable offences. Hawk. b. 1, c. 75, s. 9. See Viner's Abridgment, *tit. Nuisance* (C.); Wh. Cr. L. 8th ed. §§ 1473 *et seq.* And though it has been holden that no indictment will lie for distributing lawful handbills on the footway in the street, to the inconvenience of the passengers (*R. v. Sermon*, 1 Burr. R. 516), yet it seems now to be well established that every unauthorized obstruction of a highway is a misdemeanor. *R. v. Cross*, 3 Campb. 227. Thus, a wagoner habitually keeping his wagon standing for hours to unload (*R. v. Russell*, 8 East, R. 427), a constable collecting a crowd by a sale (*Com. v. Milliman*, 13 S. & R. 403), a coachmaster plying for passengers, and allowing his coach to remain in the street more than a reasonable length of time to take up and set down passengers (*R. v. Cross*, 3 Campb. 224), an auctioneer placing goods on the pavement intended by him for sale (*Pasmore's case*, 1 S. & R. 217), and the owner of a house allowing it to remain under repair, and obstructing the public passage for a longer time than is necessary (*R. v. Jones*, 3 Campb. 330), will be respectively indictable for nuisances. So where the defendants, who were proprietors of a distillery in the city of Brooklyn, were in the habit of delivering grains remaining after distillation, called slops, by passing them through pipes to the public street opposite their distillery, where they were received into casks standing in carts and wagons; and the teams and carriages of the purchasers were accustomed to collect there in great number to receive and take away the article; and in consequence of their remaining there to take their turns, and of the strife among the drivers for priority, and of their disorderly conduct, the street was obstructed and rendered inconvenient to those passing thereon, it was held that the defendants were guilty of nuisance. *People v. Cunningham*, 1 Denio, 524. Nuisances resulting from the several acts of distinct parties, *e. g.* occupiers of land raising fenders along a line of navigation, may be made the subject of a joint indictment against all of them (*R. v. Trafford* and others, 1 B. & Ad. 874); but the ill consequences of erecting piles in a harbor, if slight, uncertain, and rare, may not subject the parties to prosecution. *R. v. Tindall*, 6 A. & E. 143; 1 N. & P. 719; Wh. Cr. L. 8th ed. §§ 1416, 1477.

To divert a part of a public stream, whereby the current of it is weakened, and rendered incapable of carrying vessels of the same burden as it could before, is a common nuisance. 1 Hawk. c. 75, s. 11. But if a ship or other vessel sink by accident in a river, although it obstructs the navigation, yet the owner is not indictable as for a nuisance for not removing it. *R. v. Morris*, 1 B. & Ad. 441; *R. v. Watts*, 2 Esp. 675; *R. v. Tindall*, 6 A. & E. 143; *R. v. Russell* and others, 9 D. & R. 561; *R. v. Ward*, 4 A. & E. 384; 6 B. & C. 566. After conviction, the court may award a fine, or (if the subject matter of the nuisance indicted is of a permanent nature, admitting of abatement) prostration of so much of the thing as makes it a nuisance, or both fine and prostration; but both are not absolutely necessary, for the judgment should be adapted to the nature of the case (*R. v. Pappineau*, Stra. 686; *R. v. Yorkshire*, 7 T. R. 467; *R. v. Stead*, 8 Ib. 142; 3 Bla. C. 221); and if the obstruction which was indicted is removed, so that the public have free passage again, the judgment will be for a nominal fine. *R. v. Inledon*, 13 East, 164; *R. v. White and Ward*, 1 Burr. 338. See Wh. Cr. L. 8th ed. §§ 1473 *et seq.*

returning, passing, repassing, riding and laboring, etc. (*Conclude as in book 1, chapter 3.*)

OBSTRUCTIONS TO HIGHWAYS, ETC.

(675) *For erecting a gate across a public highway.*(f)

[*For non-repairing of roads, see infra, 781, n.*]

That at the time of committing the nuisance hereinafter mentioned, there was and yet is a certain ancient common highway in the parish of M. in the county of N., leading from, etc., into, through, and over a certain public(g) highway, called the great north road, and from thence to, etc., in the parish of B., in the said county, for all the good people of said state to go, return, and pass on foot and on horseback, at their free will and pleasure, and that on, etc., A. B., late of, etc., with force and arms, at a certain place there, in the parish of aforesaid, contiguous to and on the east side of the great north road aforesaid, unlawfully and injuriously did erect and cause to be erected a certain wooden gate, of the length of fifteen feet, and of the height of four feet, upon and across the said highway, leading from the place called, etc., to the great north road aforesaid; and that the said A. B., the said wooden gate so as aforesaid erected and made from the said, etc., until the day of the taking of this inquisition, with force and arms, at, etc., aforesaid, unlawfully and injuriously did continue locked and fastened with an iron chain, and yet doth continue, by which the common highway last aforesaid, during all the time aforesaid, was so obstructed and stopped up that the good people of said state, in, by, and through the same highway could not, nor yet can go, return, and pass on foot and on horseback so freely as they ought and were wont to do; to the great damage and common nuisance(h) of all the good citizens of the said state going, returning, passing, and repassing, in,

(f) Dickinson's Q. S. 6th ed. 417.

(g) So in *R. v. Stratford (Inhab.)*, 3 Ld. Raym. 40, in error; Dickinson's Q. S. 6th ed. 417.

(h) Every indictment or presentment of this class, whether for nuisances arising from neglect of duty or for encroachments on the public rights, must, in its conclusion, contain the words "to the common nuisance of all the liege subjects of our lady the now queen," or of "the citizens of the said state," or "commonwealth," residing, passing, or using, etc. (according to the facts); 2 Stra. 688; Dickinson's Q. S. 6th ed. 417. See 674, note; Wh. Cr. L. 8th ed. § 1427.

along, and through, the said last mentioned highway, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(676) *For erecting and continuing a house, part of which was on the highway.*(i)

(*Describe the highway as before.*) That A. B., late of, etc., with force and arms, at, etc., unlawfully did erect and build, and cause and procure to be erected and built, a certain brick messuage and tenement, containing in length twelve feet and six inches, and in depth at the east end thereof five feet and six inches, and in depth at the west end thereof two feet nine inches, and that the same was erected and built, and caused and procured to be erected and built, by him the said A. B., in and upon the said ancient and common highway at the parish aforesaid, in the county aforesaid, to wit, opposite to a certain dwelling-house of one C. H. there situate, and the said part of the said messuage and tenements so erected and built, and caused and procured to be erected and built, by him the said A. B. as aforesaid, in and upon the said ancient and common highway, at the parish aforesaid, in the county aforesaid, he the said A. B. from the said day of in the year aforesaid, until the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did continue and yet doth continue; by reason and means whereof the said ancient and common public highway was, during the time aforesaid, at the parish aforesaid, in the county aforesaid, encroached upon, narrowed, and straitened, so that the good people of the said state, by and through the said highway could not, nor yet can go, return, etc. (*As before.*)

(i) *R. v. Wright*, 3 B. & Ad. 681. See form of indictment for erecting and continuing a market stall in a public highway. *R. v. Starkey*, 7 A. & E. 95. An indictment lies against even the tenant at will of a house, which, standing on the highway, is ruinous and like to fall down, for, as the danger is what concerns the public, they have a remedy against the occupier in respect of his occupation. *R. v. Watts*, 1 Salk. 357, S. C. Ld. Raym. 856; *Rym. Ent.* 25; see for other cases, *Burn's Justice*, tit. Highways, s. vi. 4 (cited 9 B. & C. 730); see *R. v. Hollis*, 2 Stark. N. P. C. 536. An increased general facility in communicating with a seaport, and particularly in the conveying coals there, will not justify narrowing the highway by laying down a railway alongside of it. *R. v. Morris*, 1 B. & Ad. 441. As to the neighborhood of railways, annoying old roads by smoke, see *R. v. Pease*, 4 B. & Ad. 30; *R. v. Gregory*, 5 Ib. 555; 2 N. & M. 478; 2 Tyr. R. 201, S. C. in error. Wh. Cr. L. 8th ed. §§ 1424, 1476. See note to 674, as to the cases generally on this point.

(677) *For obstructing a common highway by placing in it drays.(j)*

In the county aforesaid, in a certain street there, called Leman street, being a common highway, used for all the good people of said state, with their horses, coaches, carts, and carriages to go, return, pass, repass, ride, and labor, at their free will and pleasure, unlawfully and injuriously did (put and place three empty drays, and did then and on the said other days and times there, unlawfully and injuriously permit and suffer the said empty drays respectively to be and remain in and upon the common highway aforesaid for the space of several hours, to wit, for the space of five hours, on each of the said days); whereby the common highway aforesaid, then and on the said other days and times, for and during all the time aforesaid, on each of the said days respectively, was obstructed and straitened, so that the good people of the said state could not then, and on the said other days and times, go, return, pass, repass, ride, and labor with their horses, coaches, carts, and other carriages, in, through, and along the common highway aforesaid, as they ought and were wont and accustomed to do; to the great damage and common nuisance of all the people of the said state, going, returning, passing, repassing, riding, and laboring in, through, and along the common highway aforesaid, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(678) *Same, with filth, etc.*

That A. B., of Boston aforesaid, yeoman, on, etc., at, etc., a certain common and public nuisance in and upon the land and tenement of him the said A. B., situated at, etc., near to certain public passage ways, to wit, certain passage ways called and known by the name of did cause, create, suffer, and main-

(j) Archbold's C. P. 5th Am. ed. 756.

See precedents for obstructing a highway by continuing a hedge across it (C. Cir. Com. 307); by erecting a gate across it (6 Went. 401, 405; Reg. v. Bosfield, 1 C. & M. 151); by building or continuing a building upon it (4 Went. 181, 191; 1 A. & E. 822); by placing carts upon it for the sale of vegetables (C. Cir. Com. 305); by laying soil upon it (C. Cir. Com. 303); by laying rubbish upon it (C. Cir. Com. 315); by digging holes in it (C. Cir. Com. 303, 314); by digging a horse-pond and erecting a cistern in it (C. Cir. Com. 304); by stopping a watercourse and thereby overflowing the highway (C. Cir. Com. 376); by exhibiting effigies at a window and thereby attracting a crowd. R. v. Carlile, 6 C. & P. 637; Wh. Cr. L. 8th ed. §§ 1413, 1464.

tain, by then and there causing and suffering great quantities of offensive and stinking filth, water, and substances, solid and liquid, to collect, stagnate, ferment, and be mixed together in and upon his land and tenement aforesaid, and from his said land and tenement to flow, descend, and be removed to and upon certain open and exposed places and yards, upon, in, and near the same land and tenement, and to and upon certain public passages near thereunto, to wit, certain passage ways called and known by the name of and from said offensive and stinking substances, water, and filth did cause, suffer, and permit divers noxious, offensive, deleterious, unwholesome, and unhealthy vapors, exhalations, and smells to arise, and then and there to contaminate, poison, and destroy the air and atmosphere above, around, and near the same tenements and lands, and in and upon and over said passage ways, to wit, the passage ways called over which the good citizens of said commonwealth in great numbers pass and repass every day, to wit, to the number of three hundred passengers daily, and near which many citizens inhabit, live, and work, to the great damage and injury of said passengers, and all other persons there being, residing, and passing, to the great hazard of their health, comfort, and lives, and to the common nuisance of all of said passengers, persons, and citizens, and of all the citizens of said commonwealth there being, and against, etc. (*Conclude as in book 1, chapter 3.*)

(679) *For letting off fireworks in the public street.*(k)

That A. B., late of, etc., on, etc., at, etc., in a certain common and public street and highway there for all the good people of the said state, on foot and with their horses, carts, and carriages to go, return, ride, pass, and repass, and labor, at their free will and pleasure, wrongfully, unlawfully, and injuriously did fire certain fireworks called rockets, serpents, and Roman candles, whereby the said public street and common highway was then

(k) Dickinson's Q. S. 6th ed. 421. 9 & 10 Wm. III. c. 7, provides by s. 2 and 3 specific penalties for this offence, to be levied by distress after summary conviction by a justice; yet by the first section, the offence is declared to become a *common nuisance*; therefore it may be indicted as such, either at common law or under the statute. *R. v. Harris*, 4 T. R. 202; 1 Saund. 135, n. (1). The making, selling, throwing, or permitting to be thrown from any house, making, or selling any moulds for making, or aiding in making any fireworks, are all declared to be offences by the different sections of the statute.

and there greatly obstructed, and divers good citizens of the said state then and there standing, being, passing, and repassing in and along the said last mentioned public street and common highway, were then and there greatly terrified and put in great peril and danger of bodily harm, and could not then go, return, pass, and repass, on foot and with their horses, coaches, carts, and carriages, in and along the said last mentioned public street and common highway, as they ought to have done, and had been used and accustomed to do, and otherwise might and would have done; to the great terror, alarm, danger, and common nuisance of all the good people of the said state in and near the said public street and highway inhabiting and residing, and of all others the good people of the said state there standing, being, and passing, in contempt of the said state and its laws, to the evil example, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(680) *For keeping a pond of stagnant water in a city.*

That J. P., I. Z., and H. H., all late of, etc., yeomen, on, etc., and at divers days and times between that day and the day of the taking of this inquisition, with force and arms, etc., at the city aforesaid, and within the jurisdiction of this court, then and there unlawfully and knowingly (*l*) did keep and permit to be and remain, in and upon a certain lot or piece of ground to them the said J., I., and H. belonging, and in their possession then and there being, situate near and adjoining the public streets in the said city, to wit, Mulberry street and Eighth street, a certain pond of putrid, filthy, noxious, and stagnant water, one hundred yards in circumference, by and from which divers hurtful, pernicious, and unwholesome smells, on the day and during the time aforesaid, did and doth arise, and the air was and yet is thereby greatly corrupted and infected, to the great damage and common nuisance, not only of all the subjects of this commonwealth there resident and dwelling, but also of all the subjects of this commonwealth passing and repassing, etc.

(*l*) As to *scienter* in such cases, see *Stein v. State*, 37 Ala. 123, and note to form 674.

(681) *For placing a quantity of foul liquor, called "returns," in the highway.(m)*

That A. B., the day of in the year, etc., at the county aforesaid, and within the jurisdiction of this court, did discharge out of the still-house of him the said A. B., lying and being in the county aforesaid, into the road, etc., a quantity of foul and nauseous liquor called "returns," to the great damage and common nuisance of all the good citizens of this commonwealth, and against, etc. (*Conclude as in book 1, chapter 3.*)

(682) *For laying dung near a public street, whereby the air was infected and inhabitants annoyed.(n)*

That A. B., late of, etc., on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at, etc., aforesaid, to wit, in a certain common and public highway there, called B.'s wharf, unlawfully and injuriously did put, place, and leave, and caused and procured to be put, placed, and left, divers large quantities of dung and filth, whereby divers noxious and unwholesome smells from the said dung and filth did then and there arise, and thereby the air there became and was greatly corrupted and infected; to the great damage and common nuisance not only of all the good people of the said State, inhabiting and residing near the place where the said dung and filth was so put, placed, and left as aforesaid, but also of all other good people of the said State in, by, and through the said highway, and near the place aforesaid, going, returning, passing, and repassing, and against, etc. (*Conclude as in book 1, chapter 3.*)

(683) *For letting wagons stand in the public street, so as to incommode passengers.(o)*

That A. B., late of, etc., before and at the times hereafter mentioned, was and still is a proprietor of divers wagons for conveyance for hire of goods and merchandise to and from E., and being such proprietor, he the said A. B., on, etc., and on divers

(m) Drawn by William Bradford, Esq., then attorney general of Pennsylvania.

(n) Dickinson's Q. S. 6th ed. 427.

(o) Dickinson's Q. S. 6th ed. 421.

other days and times between that day and the day of
in the year aforesaid, in the parish of in the county aforesaid, without just cause or excuse, but wrongfully and unjustly, did cause and permit divers, to wit, twenty, wagons, to stand and remain for a long time, to wit, ten hours on each day, before his warehouse, situate in a public street and highway called in the parish aforesaid, in the county aforesaid, and divers cumbrous and other parcels which had been conveyed or were intended to be conveyed in such wagons, to lie during such time scattered about such public street; to the common nuisance, great hinderance, impediment, and annoyance of all the good people of the said state, passing and repassing such streets, etc.

Second count.

(That the defendant permitted divers wagons to stand in the public street and highway, and there to remain before his warehouse for a long and unreasonable time, by which the people of the said state were, during that time, much impeded and obstructed, etc.)

(684) *For placing casks in a highway.*

That J. B., late, etc., on, etc., at, etc., with force and arms, etc., in and upon a certain road and highway called in the township and county, etc., the said road then being a common road and highway for all the citizens of this commonwealth to go, pass, and travel, at their will, with their horses, carts, and carriages, ten wooden casks unlawfully and injuriously did put, place, and cause to be put and placed, and that the said ten wooden casks, by the said J. B. in the common road and highway put and placed, and caused to be put and placed, from the day of in the year aforesaid, to the day of in the month and year aforesaid, in the county aforesaid, the said J. B. did voluntarily permit to be and remain. By reason whereof the common road and highway aforesaid, for all the time aforesaid, at the county aforesaid, was so obstructed that the good citizens of this commonwealth, in and along the said road and highway, about their necessary business, with their horses, carts, and carriages could not go, pass, and travel so freely as of right they ought, to the great damage and common

nuisance and hinderance of all the citizens of this commonwealth in and along the said road passing, etc., to the evil example, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(685) *For leaving open an area on foot pavement in a street.*(p)

(*Describe a public way as in 674.*) And that A. B., late of, etc., on, etc., with force and arms, at, etc., in a certain part of the said common highway and public street there, to wit, in the foot pavement of the said street, before the dwelling-house of him the said A. B., unlawfully and injuriously did leave open a certain area of the length of and of the breadth of belonging to him the said A. B., without putting or placing, or causing to be put and placed, any rails or other fence to inclose the same; and he the said A. B., from, etc., until, etc., at, etc., the said area so as aforesaid being in the said foot pavement of the said common highway and public street, unlawfully and injuriously did cause, permit, and suffer to be, remain, and continue open, by reason and means whereof the good people of the said state, during the time aforesaid, could not, nor yet can go, return, and pass on foot in, by, and through the said common highway and public street, and as they were used and accustomed and were wont and ought to do, without great peril and danger of their lives; to the great damage and common nuisance of all, etc., in, by, and through, etc., going, returning, and passing on foot, and against, etc. (*Conclude as in book 1, chapter 3.*)

(686) *For laying dirt in a footway.*(q)

That P. B., late of, etc., with force and arms, at, etc., aforesaid, in a certain common footway there, leading from that part of N. Green which is in the parish aforesaid, in the county aforesaid, towards and unto the parochial church of the same parish in the said county, did unlawfully and injuriously put, place, and lay, and cause to be put, placed, and laid, two cartloads of dirt and other filth in the said footway, from the said, etc., until the day of the taking of this inquisition. at, etc., aforesaid, and the same on, etc., at, etc., unlawfully and injuriously did permit and suffer to be and remain, by reason whereof the footway aforesaid, dur-

ing the time aforesaid, was and yet is greatly obstructed and straitened, so that the said people of the said state through the same footway could not, during the time aforesaid, nor yet can go, return, pass, repass, and labor as they ought and were wont to do; to the common nuisance and great damage, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(687) *For keeping a ferocious dog.*

That A. B., late, etc., on, etc., at, etc., and on divers other days and times, with force and arms, near unto the common highway, and in and near the public streets there, unlawfully and knowingly did keep, and still doth keep, a certain dog, of a ferocious and furious nature, and the said dog, on the day and year aforesaid, and on the said other days and times, at the county aforesaid, near unto the common highway, and in and near the public streets, then and there unlawfully and knowingly did permit and suffer, and still doth permit and suffer, to go unmuzzled and at large, by reason whereof the good people of this commonwealth, and the citizens of the county of on the day and year aforesaid, and on the said other days and times, at the county aforesaid, could not, nor can they now go, return, pass, and labor in and through the said common highways and public streets, without great danger and hazard of being bit, maimed, and torn by the said dog, and losing their lives, to the great damage, terror, and common nuisance of all the people and citizens aforesaid, in, by, and through the said common highway and public streets then going and returning, passing, repassing, and laboring, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(688) *For profane swearing in a public street.*

That A. B., being an evil disposed person, on, etc. (and on divers days between that day and the finding of this indictment), in the public streets of in the county aforesaid, in the jurisdiction of this court, did profanely curse and swear, and take the name of God in vain (and was, from the said (*date*) to the finding of this indictment, a common and public swearer, in the highways and other public places in the said state), to the evil

example, etc., and to the common nuisance of the good citizens of the state, and against, etc.^(r)

(689) *For obstructing townways in Massachusetts under stat. of 1786, ch. 67, § 7, and 1786, ch. 81, § 6.*^(s)

That A. B., of, etc., laborer, etc., on, etc., and on divers other days and times between that day and the taking of this inquisition, at, etc., with force and arms, in and upon a certain townway there legally laid out, accepted, and established as a townway in the said town of S. (which way leads and extends from the dwelling-house of G. H. to the dwelling-house of J. K. in the said town of S.), did unlawfully and injuriously put, place, and erect a certain fence, in and upon and across the highway aforesaid; and the same fence did then and there unlawfully and injuriously continue and suffer to remain, from the said day of to the day of the finding of this bill; whereby the way aforesaid, for and during the whole time aforesaid, was wholly obstructed, so that the citizens of the commonwealth were pre-

(r) Taylor, C. J.—“It was held, in the case of the State *v.* Waller, that if the offence with which the defendant then stood charged had been laid as a common nuisance, and the jury had so found it, the judgment would have been supported. Drunkenness and profane swearing are placed on the same footing by the act of 1741, ch. 30, and where committed in single acts, may be punished summarily by a justice of the peace. But where the acts are repeated, and so public as to become an annoyance and inconvenience to the citizens at large, no reason is perceived why they are not indictable as common nuisances. Several offences are stated in the books as so indictable, though not more troublesome to the public than the one before us. A common scold is indictable as a common nuisance; and with equal, if not stronger reason, I should think, a common profane swearer may be so considered.” State *v.* Ellar, 1 Dev. 267, 268. As sustaining the position that a common profane swearer is indictable as a nuisance, see Barker *v.* Com., 19 Penn. St. 412; State *v.* Kirby, 1 Murph. 254; Ball *v.* State, 1 Swan, 42. The passages in brackets in the text are not in the form in State *v.* Ellar. But they can do no harm; and may serve, in some jurisdictions, to make out an indictable offence. Without them the form is defective, as it charges on its face but a single act of swearing. See State *v.* Pepper, 68 N. C. 259, where this last point is affirmed.

(s) Com. *v.* Gowen, 7 Mass. 378. This indictment was contested on two grounds: first, that no indictment lies for an obstruction to a townway, which it was urged was distinguishable from a public highway by being merely for the accommodation of the people of the town; and, secondly, because the continuance of the nuisance was not averred to be with force and arms. These latter words, however, all the courts have now concurred in treating as superfluous in every case (Wh. Cr. L. § 403), and the first point was not seriously pressed. The spirit of the ruling in Resp. *v.* Arnold (3 Yeates, 423) is, that a road to which the public has access, even though it may be technically called a private road, is to be protected from obstruction by indictment.

vented from passing and repassing, and using the said way, as they have a right and have been wont to do; to the great injury and common nuisance of all the citizens of said commonwealth having occasion to pass, repass, and use the way aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(690) *For blocking up the great square of a town-house in Pennsylvania.*(t)

That for a long time ago, before and until the time of the obstruction and nuisance hereinafter mentioned, there was, and still of right ought to be, a certain common and public highway in the borough of Bedford, and county aforesaid, commonly called and well known by the name of the public and great square of said borough, for all good citizens of this commonwealth to go, return, pass, repass, and ride and labor, on foot and on horseback, and with their cattle and carriages at their free will and pleasure, and that on, etc., a certain house, erection, and building made of bricks, mortar, and other materials, had been built and erected by certain persons to the jurors aforesaid as yet unknown, which said house, erection, and building took in, encroached upon, stopped up, and obstructed a certain part of the aforesaid common and public highway called the public and great square of said borough, being in length thirty-nine feet and upwards, and in breadth twenty-one feet and upwards, whereby the said public and common highway was obstructed and stopped up, so that the good citizens of this commonwealth could not, with their cattle and carriages, on foot and on horseback, go, return, pass and repass, ride and labor, at their free will and pleasure, as they had been accustomed to do; and that G. W. B. and J. W. D., late of the said county, yeomen, the said erection and building so as aforesaid built and erected, and as aforesaid taking in, encroaching upon, stopping up, and obstructing a certain part of the aforesaid common and public highway, on, etc., and from that time until the day of taking this inquisition, with force and arms, at the borough of Bedford, in the county aforesaid, and within the jurisdiction of this court, unlawfully and injuriously did

(t) Com. v. Bowman, 3 Barr, 203. Wh. Cr. L. 8th ed. § 1473.

keep, maintain, and continue, and still do keep, maintain, and continue, whereby the said common and public highway, during the time aforesaid, hath been and yet is obstructed and stopped up, so that the good citizens of this commonwealth during all that time, have been and yet are obstructed and hindered in going and returning, passing and repassing, riding and laboring, on foot and on horseback, with their cattle and carriages, at their free will and pleasure, in and along the said common and public highway, as they had been used and accustomed to do; to the great damage and common nuisance of all the good citizens of this commonwealth in and along the said public and common highway going, returning, passing, repassing, riding, and laboring, on foot and on horseback, and with cattle and carriages, etc. (*Conclude as in prior counts.*)

(691) *For erecting a wooden building on public square of a village in Vermont.*(u)

That A. B., etc., on, etc., with force and arms, at, etc., did unlawfully and injuriously, in and upon a certain public square, and in the common highway there, called the public square, situate in the village of St. A., in the county of F., lying east of and adjoining the stage road leading through the village of St. A., put, place, and set up, and caused to be put, placed, and set up, one large wooden building, forty feet and upwards in length, and thirty feet and upwards in breadth; and the said building so as aforesaid put, placed, and set up in and upon the aforesaid public square and common highway, he the said A. B., upon and from the said twenty-eighth day of May, A. D. one thousand eight hundred and twenty-eight, till the present time, with force and arms, unlawfully and injuriously hath upheld, maintained, and continued, and still doth uphold, maintain, and continue, whereby the said public square and common highway, on, etc., and during all that time, was and has been greatly obstructed, narrowed, and straitened, so that the citizens of this state, in and upon and through said public square and common highway, all that time could not, nor can now go, return, pass, and repass as they ought and were accustomed to do; to the great damage

(u) *State v. Wilkinson*, 2 Vt. 480.

and nuisance of all the citizens of this state going and returning, passing and repassing, in and upon and through the said public square and common highway, and against, etc. (*Conclude as in book 1, chapter 3.*)

(692) *For throwing dirt upon a public lot.(v)*

That A. B., late of, etc., yeoman, on, etc., and from that day until the taking of this inquisition, at, etc., with force and arms, etc., unlawfully and obstinately did place, put, and keep, and caused to be placed, put, and kept, on a certain lot or piece of ground situate, lying, and being at the corners of Spruce, Front, and Dock streets, in the said city, and near and adjoining to the public streets and highways, to wit, Spruce, Front, and Dock streets, in the said city, and also near the dwelling-houses of divers citizens of this commonwealth, certain large quantities, to wit, one hundred cartloads, of filth, dung, manure, dirt, excrement, and scrapings from the surface of the wharves, gutters, and streets in the said city, whereupon divers fetid, noisome, hurtful, pernicious, and unwholesome smells, on the days and times aforesaid, did and still do arise and proceed, whereby the air there was and still is corrupted, fetid, and infected, and the healths of the liege citizens of this commonwealth there inhabiting, residing, and passing have been and still are endangered and impaired, to the great damage and common nuisance of all citizens of this commonwealth there inhabiting, residing, and passing, to the evil example, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(693) *For stopping an ancient watercourse, whereby the water overflowed the adjoining highway, and damaged the same.(w)*

That P. Q., late of, etc., on, etc., with force and arms, at, etc., a certain ancient watercourse adjoining to a common public highway, within the same parish, leading from the said town of B., in the county aforesaid, towards and into the city of G., in the county of G. aforesaid, with gravel and other materials, unlawfully and injuriously did obstruct and stop up, and the said

(r) This indictment was framed in 1810, by P. A. Browne, Esq., then prosecuting attorney in Philadelphia.

(w) Dickinson's Q. S. 6th ed. 419. See for another form for same, 696.

watercourse so as aforesaid obstructed and stopped up, from, etc., aforesaid, until the day of the taking of this inquisition, at, etc., aforesaid, unlawfully and injuriously did continue, by reason whereof the rain and waters that were wont and ought to flow and pass through the said watercourse, on the same day and year aforesaid, and on divers other days and times afterwards, between that day and the day of the taking of this inquisition, did overflow and remain in the said common highway there, and thereby the same was and yet is greatly hurt, damaged, impaired, and spoiled, so that the good people of the said state, through the same way, with their horses, coaches, carts, and carriages, then and on the said other days and times could not, nor yet can go, return, pass, repass, ride, and labor, as they ought and were wont to do; to the great damage and common nuisance of all the good people of the said state through the same highway going, returning, passing, repassing, riding, and laboring, and against, etc. (*Conclude as in book 1, chapter 3.*)

(694) *For diverting a watercourse running into a public pond or reservoir.*(w')

That from time whereof, etc, there has been and still is a common watercourse, near a certain place called F., within the parish of B., in the said county of L., which continually during all the said time, at all times of the year, hath run and been used, and accustomed and of right ought, without any obstruction or impediment, to run out of a certain place called the Great Wash, situate and being in the parish of S., in the county aforesaid, into and along the common highway there, leading from
to and into a certain pond and reservoir, in the said common highway there, and from the said pond and reservoir into the lands of H. D., at which said watercourse, pond, and reservoir, the inhabitants of the said parish of B., and all other the citizens of the said state, in and through the said common highway passing and repassing, all the said time have used, and of right been accustomed to water their horses and other cattle at their free will and pleasure. And the jurors, etc., present, that P. Q., late of, etc., on, etc., at, etc., aforesaid, in and across the said watercourse, in the said

highway there, a certain mound, bank, or dam did then and there make, erect, and build, and the same did raise so high, that the said water in its said ancient course was obstructed, and into the said pond and reservoir did not run as it was used and accustomed and ought to do, so that the inhabitants of the said parish, and all other the said citizens of the said realm, in and through the said common highway passing and repassing, were and still are deprived of the use of the said pond and reservoir of water for their cattle, and hindered from enjoying the same as they ought and were wont to do; to the great damage and common nuisance, not only of all the inhabitants of the said parish of B., but of all other the citizens of the said state, in and through the said common highway passing and going, and against, etc. (*Conclude as in book 1, chapter 3.*)

(695) *For obstructing a watercourse called Pegg's Run.*(x)

That S. G., late of, etc., yeoman, on, etc., at, etc., unlawfully and injuriously did put and place divers quantities of earth, gravel, and other materials on a piece of land adjoining the public highway, and near a certain ancient watercourse called Pegg's run, there being, and the same from the year and day aforesaid, to the day of taking this inquisition, did and yet doth injuriously and unlawfully continue, by reason whereof the rain and waters which were wont and ought to flow and pass to and through the same watercourse, on the said first mentioned day and year, and at divers other days and times afterwards between that day and the taking of this inquisition; did overflow and remain on the said piece of ground, and then and there, and at the said days and times, did become stagnant, putrid, and noxious, from whence unwholesome damps, fogs, and smells did arise, whereby the air was greatly corrupted and in-

(x) Framed by Mr. Bradford in 1714. "*Pegg's run* [obliterated] ran a course which is now mainly occupied by Willow street. One branch commenced at Fairmount avenue west of Fifteenth street, and then ran southeast nearly to Vine; thence northeast above Callowhill street and east of Tenth, where it was joined by a branch which rose west of Eleventh street between Green street and Fairmount avenue. The united streams flowed eastwardly to the Delaware. This creek was called Cohoquinque in a patent to Julian Hartsfelder for the whole of the Northern Liberties in 1678. It was called Pegg's run after Daniel Pegg, an Englishman, who was the purchaser of Hartsfelder's land. On Seull and Heap's map it is called Cohoquenogue; on Hill's Cohoquinogue." Ledger Almanac, 1879.

fectcd, to the great damage and common nuisance of the liege citizens of this commonwealth dwelling thereabouts, and all others passing and repassing on the said highway and near the said stagnant waters, and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said S., on, etc., at, etc., unlawfully and injuriously a certain ancient watercourse called Pegg's run, with earth, gravel, and other materials did obstruct and stop up, by reason whereof the rains and waters that used to flow through the same watercourse did overflow the adjacent lands, and remain and become putrid, stagnant, and noxious, and did send forth unwholesome and infectious damps, fogs, and smells, whereby the air was greatly corrupted and infected, to the great damage, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(696) *For permitting waters of a mill to overflow.*(y)

That A. B., etc., being possessed of a certain mill and mill-dam with their appurtenances, situate near and adjacent to a certain common highway and public road, and the dwelling-houses of divers of the good citizens of this commonwealth, did, on, etc., and on divers days before and since, unlawfully and injuriously permit the water of the mill-pond to overflow the adjacent lands, as well of others as his own, and also the public road or highway, by means whereof the land so overflowed was rendered and kept marshy, and filled and covered with noxious weeds and putrid vegetation, whereby the air became corrupted and infected, to the great damage and common nuisance, etc.

(697) *For obstructing an ancient watercourse, whereby a public highway was overflowed and spoiled.*(z)

That P. A., late of, etc., yeoman, on, etc., at, etc., a certain ancient watercourse called the Raystown branch of Juniata, and a certain other ancient watercourse called Danning's creek, which

(y) This count was sustained in Virginia, on demurrer, in *Stephen v. Com*, 2 Lehigh, 759. See *supra*, 693.

(z) *R. v. Arnold*, 3 Yeates, 417. This indictment was sustained by Yeates and Smith, Justices, at a circuit court in Bedford, 1802. It was held that it was not necessary to state how far in length or breadth the water stood on the road. See *supra*, 693.

said ancient watercourse called the Raystown branch of Juniata, running from Londonderry township, in the county aforesaid, and which said ancient watercourse called Danning's creek, running from St. Clair township, in the county aforesaid, and uniting in and running through Bedford township, in the county aforesaid, and running between the said townships of Londonderry and St. Clair and the township of Hopewell, in the said county, across and through which the commonwealth's highway, and a road leading from the town of Bedford, in the county aforesaid, towards and unto the crossings of Juniata, in the county aforesaid, was laid out in due form of law, did obstruct and stop up, and the said watercourses so as aforesaid obstructed and stopped up, from the said, etc., until the day of the taking of this inquisition, at the township of Bedford, in the county aforesaid, unlawfully and injuriously hath continued and still doth continue, by reason whereof, the rain and waters that were wont and ought to flow and pass through the said watercourses, on the same day and year, and divers other days and times afterwards between that day and the day of the taking of this inquisition, did overflow and remain in the commonwealth's highway or road aforesaid, in the township of Bedford aforesaid, and thereby the same highway or road was and yet is greatly hurt and spoiled, so that the liege citizens of the commonwealth, through the same highway or road, with their horses, coaches, carts, and carriages, then and at other days and times, could not nor yet can go, return, pass, ride, and labor, as they ought and were wont to do, to the great damage and common nuisance of all the liege citizens of the commonwealth through the same highway or road going, returning, passing, riding, and laboring, and against, etc. (*Conclude as in book 1, chapter 3.*)

(698) *For erecting a dam on a navigable river.*(a)

That defendant on, etc., at, etc., did erect and build, set up,

(a) *Com. v. Church*, 1 Barr, 105. This indictment was quashed by the quarter sessions of Dauphin county, on the ground that the proceeding was not in accordance with the act of 22d March, 1803, which prescribed the only method by which such a nuisance could be abated. The judgment was reversed by the supreme court, which held, that a dam in a stream which was a highway, was *prima facie* indictable as a nuisance, not in subordination to the act of 1803, but according to the course of the common law. This indictment, however, was not examined in any other aspect. See Wh. Cr. L. 8th ed. §§ 1424, 1477.

repair, and maintain a certain dam, of the length of one hundred feet, of the breadth of twelve feet, and of the height of six feet, in the river Swatara, in the township of Lower Swatara, in the county aforesaid, and in that part of said river declared by an act of assembly of the commonwealth of Pennsylvania a public stream and common highway, within and across a part of the said river Swatara, within the township of Lower Swatara, and the county aforesaid, by means of which the navigation and free passage of, in, through, along, and upon said river Swatara is greatly obstructed; and the said dam so as aforesaid erected, built, and set up, did repair, maintain, and continue from the said, etc., until the day of the taking of this inquisition, with force and arms, at the township and county aforesaid, and the same dam does still keep up, maintain, and continue, to the great damage and common nuisance, obstruction, and impediment of all the good citizens of this commonwealth passing and navigating on and through the said public stream and highway, with their arks, craft, boats, and vessels about their necessary business, with their goods and chattels and merchandise, contrary, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(699) *For erecting obstructions on a navigable river.*(b)

That a certain part of the river situate and being between and and also wholly situate and being in the said county of is, and from time whereof the memory of man is not to the contrary hath been, an ancient river, and an ancient and common highway for all the citizens of said commonwealth with their ships, lighters, boats, and other vessels to navigate, sail, row, pass, and repass, and labor at their will and pleasure, without any impediment or obstruction whatever. And the jurors aforesaid, upon their oath aforesaid, do further present, that A. B., late of, etc., at, etc., fisherman, on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, at, etc., in the said county of unlawfully, wilfully, and injuriously did erect, place, fix, put, and set in the said river and ancient and common highway there, a certain (*here describe the obstruction according to the fact*), and

that the said A. B., from the day and year first aforesaid, hitherto, at, etc., aforesaid, the said unlawfully, wilfully, and injuriously hath continued, and still doth continue so erected, placed, fixed, put, and set in the said river and ancient and common highway aforesaid; by means whereof the navigation and free passage of, in, through, along, and upon the said river and ancient and common highway there, on the same day and year aforesaid, and from thence hitherto, hath been and still is greatly obstructed, straitened, and confined; so that the citizens of said commonwealth navigating, sailing, rowing, passing, repassing, and laboring with their ships, lighters, boats, and other vessels in, through, along, and upon the said river and ancient and common highway there, on the same day and year aforesaid, and from thence hitherto, could not nor yet can navigate, sail, row, pass, repass, and labor with their ships, lighters, boats, and other vessels, upon and about their lawful and necessary business, affairs, and occasions, in, through, along, and upon the said river and ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the citizens of said commonwealth navigating, sailing, rowing, passing, repassing, and laboring with their ships, boats, lighters, and other vessels, in, through, along, and upon the said river and the ancient and common highway there; to the great obstruction of the trade and navigation of and upon the said river, and against, etc. (*Conclude as in book 1, chapter 3.*)

(700) *For obstructing a river which is a public highway, by erecting a fish trap or snare in it called "putts."*(c)

That the river Severn, that is to say, that a certain part of the said river lying and being in the county of Gloucester, is, and

(c) This form is taken from Arch. C. P. 5th Am. ed. 757. The indictment is at common law, and the punishment is fine or imprisonment, or both. Mr. Archbold remarks, that to divert a part of a public river, whereby the current of it is weakened and rendered incapable of carrying vessels of the same burden as it could before, is a common nuisance (1 Hawk. c. 75, s. 11); but if a ship or other vessel sink by accident in a river, although it obstructs the navigation, yet the owner is not indictable as for a nuisance, for not removing it. R. v. Watts, 2 Esp. 675. See R. v. Russel and others, 9 D. & R. 566; 6 B. & C.

from the time whereof the memory of man is not to the contrary hath been, an ancient river, and the ancient and common highway for all the good people of the said state, with their ships, barges, lighters, boats, wherries, and other vessels to navigate, sail, row, pass, repass, and labor at their will and pleasure, without any impediment or obstruction whatsoever. And the jurors aforesaid, upon their oath aforesaid, do further present, that J. S., late of the parish of B., in the county aforesaid, fisherman, on, etc., and on divers other days and times between that day and the day of taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully, wilfully, and injuriously did (erect, fix, put, place, and set up in the said river and ancient and common highway there, near a certain place called Gay's Spard, a certain snare, trap, machine, and engine commonly called putts, for the taking and catching of fish, and composed of wood, wooden stakes, and twigs; and that he the said J. S., on, etc., in the year last aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, in the said river and ancient and common highway there, the said snare, trap, machine, and engine called putts, unlawfully, wilfully, and injuriously did continue, and still doth continue so erected, fixed, put, placed, and set in the said river and ancient and common highway as aforesaid); by means whereof the navigation and free passage of, in, through, along, and upon the said river Severn and the ancient and common highway, on the day and year aforesaid, and on the said other days and times, hath been, and still is greatly straitened, obstructed, and confined, to wit, at the parish aforesaid, in the county aforesaid, so that the good people of the said state navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, wherries, and other

566; *R. v. Ward*, 4 A. & E. 384; 6 N. & M. 38; *R. v. Tindal*, 1 N. & P. 719; 6 A. & E. 143; *R. v. Morris*, 1 B. & Ad. 441; *R. v. Randall*, C. & M. 496.

The procedure by indictment at common law, is still in force in Pennsylvania, notwithstanding the cumulative remedies given by statute. See *Wh. Cr. L.* 8th ed. §§ 25, 1478. In Massachusetts the provincial statute of 8 Anne, c. 3, for preventing obstructions in rivers, was for some time in force (*Com. v. Ruggles*, 10 Mass. 391), though a transient and temporary seine or net is not within the act. *Ib.* But no indictment lies for obstructing a stream not navigable. The test is, possibility of use for practical transport. *Wh. Cr. L.* 8th ed. § 1479.

vessels in, through, along, and upon the said river and ancient and common highway there, on the same day and year aforesaid, and on the said other days and times, could not nor yet can go, navigate, sail, row, pass, repass, and labor with their ships, barges, lighters, boats, wherries, and other vessels upon and about their lawful and necessary affairs and occasions, in, through, along, and upon the said river and ancient and common highway there, in so free and uninterrupted a manner as of right they ought, and before have been used and accustomed to do; to the great damage and common nuisance of all the good people of the said state navigating, sailing, rowing, passing, repassing, and laboring with their ships, barges, lighters, boats, wherries, and other vessels in, through, along, and upon the said river Severn and ancient and common highway there, to the great obstruction of the trade and navigation of and upon the said river, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(701) *For damming creek.(d)*

That, etc., on, etc., at, etc., did unlawfully, injuriously, and knowingly erect, or cause to be erected, a certain dam across the Onondaga creek, a common and ancient watercourse, at the town of Salina, etc., by means of which the water flowing in the creek was stopped, dammed up, etc., and flowed back in and up the surface of large tracks of adjoining land, by means whereof the mud, wood, leaves, brush, and the animal and vegetable substances and other filth collected and brought down the channel of said watercourse by the natural flowing of the waters, then became and were, during all the time aforesaid, collected and accumulated in large quantities in the channel of the said watercourse, and on the lands overflowed as aforesaid; and the said mud, wood, etc., so there collected, etc., became and were

(d) *People v. Townsend*, 3 Hill's R. 479. (Wh. Cr. L. 8th ed. §§ 1419, 1433, 1459.) This count seems to have been sustained by the supreme court, who held, Bronson, J., dissenting, that the allegation that by reason of the dam, the animal and vegetable substances brought down the streams were collected and accumulated in large quantities, and became offensive, and corrupted the water, etc., was sustained by proof showing the injury to have resulted from the alternate rise and fall of the water in the pond, or from the action of the sun upon the vegetables growing on the margin, etc.; and this, notwithstanding the stream on which the dam stood, was not a public highway.

and still are very offensive, and the waters became and are corrupted; and by means whereof divers nauseous, unwholesome, and deleterious smells and stench did arise, etc., so that the air was and still is corrupted and infected, to the great damage and common nuisance of the good and worthy citizens of this state there passing and repassing, dwelling and inhabiting, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(702) *Obstruction of fish in the river Susquehanna, under the act of 9th March, 1771.(e)*

That on, etc., at, etc., A., etc., did erect, build, set up, repair, and maintain, and did assist and abet in erecting, building, setting up, repairing, and maintaining a certain mound, made of logs and stones, of the height of seven feet and length of eighteen yards, commonly called a fishing battery or wharf, in the river Susquehanna, in that part thereof declared to be a public highway, to wit, between Burkholder's island and the eastern shore of the said river, in the said township and county, for the taking of fish in the said river; and the said mound, made and erected as aforesaid, from the said, etc., until the day of taking this inquisition, with like force and arms, at the township aforesaid, have kept up and still do keep up, to the great obstruction and hinderance of the fish, fry, and spawn in passing up and down said river, and to the common nuisance of all the liege citizens of this commonwealth, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(703) *For obstructing a harbor by erecting in it piles, etc.(f)*

That before the committing, etc., to wit, from time whereof, etc., hitherto there has been and was and still is a certain ancient port and harbor, commonly called the harbor of Scarborough, in the county of York, to wit, at Scarborough, within the said county, used by the liege, etc., for the purposes of safe and commodious navigation, for the importation and exportation

(e) *Werfel v. Com.*, 5 Binn. 65. The indictment was held to set forth properly the offence created by the fourth section of the act of 9th March, 1771.

(f) *R. v. Tindall*, 6 A. & E. 143. A special verdict was rendered on which a verdict of guilty was entered. There seems to have been no doubt, however, that the facts set forth in the indictment formed a criminal offence. Wh. Cr. L. 8th ed. §§ 1416, 1417.

of goods, and for the receiving and sheltering, in times of tempests and other times of danger and distress of weather, ships and vessels navigating to and along the northern coasts of that part of the United Kingdom called England, and to and from the eastern seas and other places ; that the defendants, well knowing, etc., on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, to wit, on each and every day between, etc., with force, etc., within the said county of Y., to wit, at, etc., unlawfully, wilfully, and injuriously did erect, place, fix, put, sink, and set in the said port and harbor, and in the sea near to the shore with the said port and harbor, divers stages, erections, and buildings projecting into the said port and harbor, composed of piles, posts, planks, and timbers, and also divers large quantities of earth, stones, sand, and rubbish, to wit, one hundred thousand cart-loads of, etc. ; and unlawfully and injuriously kept and continued, and caused and procured to be kept and continued, the said stages, etc., so projecting into the said port and harbor as aforesaid, and the said piles, etc., so erected, etc., in the said port and harbor, and in the sea near to the shore in the said port and harbor, for a long space of time, to wit, from thence hitherto within the county aforesaid, to wit, at, etc. ; and thereby, during the time aforesaid, greatly obstructed, choked up, narrowed, and otherwise injured the said port and harbor, and rendered the same insecure and inconvenient, whereby the said port and harbor then and there became and was, and from thence hath been and still is greatly obstructed and choked up, narrowed, and rendered insecure and inconvenient, so that the good people of said state could not, nor yet can use the said port and harbor for the exportation and importation of goods and merchandises there, and for the receiving and sheltering of ships and vessels in times of tempests and other times of danger and distress of weather, and for other purposes of safe and convenient navigation, and could not and cannot use the said port and harbor without imminent hazard and danger of destruction of their ships, lighters, boats, and other vessels, and danger and peril of the lives of those navigating the same, and loss and damage of the goods and merchandises laden on board thereof, to the great damage and common nuisance, etc., and other persons using the said port

and harbor as aforesaid, against, etc. (*Conclude as in book 1, chapter 3.*)

(704) *For negligently permitting fence to remain, during the crop season, less than five feet high, under the North Carolina statute.*(g)

That N. B., late of, etc., on, etc., and continually before and after that time, during the crop season of the year, then and there being the occupier and cultivator of a farm as owner of the same, and being bound during the said crop season to keep up his fences around his cultivated fields five feet high, unlawfully, wilfully, and negligently did permit his said fences around his said fields to be and remain, during crop season of the year aforesaid, less than five feet high, there being no navigable stream nor deep watercourse around the same, to the common nuisance, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

UNWHOLESOME SMELLS, ETC.

(705) *General form for nuisances in carrying on unwholesome occupations near to habitations or public ways.*(h)

That A. B., late of, etc., yeoman, etc., and on divers days and times between that day and the day of the taking of this inquisi-

(g) *State v. Bell*, 3 Iredell, 506.

(h) The features peculiar to these, as well as to all other kinds of nuisances, have been already specified, *supra*, 674, note. Wh. Cr. L. 8th ed. §§ 1433 *et seq.* It remains to notice the general character of the offences themselves. Any trade, however innocent in itself, and useful in its objects, will be a nuisance if carried on in an improper place to the injury of the health or quiet of a neighborhood. Wh. Cr. L. 8th ed. § 705; *Lansing v. Smith*, 8 Cow. 146. And if, as in the case of stench produced in a manufacture, the effect be not to render the adjacent places of residence absolutely unwholesome, but to make the comfortable enjoyment of life and property impossible to a number of persons, the same liability will be incurred. *R. v. White and Ward*, 1 Burr. R. 333; *R. v. Davy*, 5 Esp. 217; *R. v. Neil*, 2 C. & P. 485; *People v. Cunningham*, 1 Denio, 524; *Com. v. Vansyckle*, 7 Penn. L. J. 82. It admits of some question, whether, where health is not affected, the public good resulting from an establishment in some respects offensive may be taken into consideration by the jury in determining whether, on the whole, it ought to be suppressed as a nuisance to the public. See 1 Russ. on Crimes, 297. In a modern case of much consideration (*R. v. Ward*, 4 A. & E. 384), it was held to be no answer to an indictment for a nuisance in a harbor by erecting an embankment, that although the work was in some degree a hindrance to navigation, it was advantageous in a greater degree to other uses of the port. *R. v. Tindall*, 6 A. & E. 143; *R. v. Morris*, 1 B. & Ad. 411. In an early case in Pennsylvania, the defendant, being charged with a nuisance in the erection of

tion, with force and arms, at, etc., in the near neighborhood of divers public streets in the said county, where divers good citizens

a wharf, offered witnesses to prove that the wharf had been beneficial to the public, and therefore not to be regarded as a nuisance; but M'Kean, C. J., said, "this would only amount to matter of opinion, whereas it is on facts the court must proceed; and the necessary facts are already in proof. Besides it would be no justification. The evidence is inadmissible." Caldwell's case, 1 Dall. 150. See also *Com. v. Vansyckle*, 7 Penn. L. J. 82; *Bright*, R. 69; cited *infra*; *Wh. Cr. L.* 8th ed. §§ 26, 1412, 1415. Length of time will not justify a public nuisance under any circumstances, even if twenty years' acquiescence concludes private rights at the beginning of that period, so as to oust all remedy by action. *People v. Cunningham*, 1 Denio, 524; *Elkins v. State*, 2 Humph. 543; *Mills v. Hall and Richards*, 9 Wend. 315; *Com. v. Alburger*, 1 Whart. 469; *Bliss v. Hall*, 4 Bing. N. C. 185; *Com. v. Tucker*, 2 Pick. 44; *Elliotson v. Feetham*, 2 Bing. N. C. 134; 1 Hawk. b. 1, c. 32, s. 8; *Rex v. Cross*, 3 Campb. 227; *Weld v. Hornby*, 7 East, 199; *Leeds v. Shakerley*, Cr. El. 751. It is true that in *R. v. Neville*, Peake's C. N. P. 91, Ld. Kenyon said, that in neighborhoods where offensive trades have been borne with for many years, they are not indictable nuisances unless materially increased by a new manufacture. And see *R. v. Watts*, M. & M. 281. The practical result often is that length of time, accompanied by particular circumstances of public convenience of one kind, opposed to the public inconvenience of another, will sometimes go a great way in making both judges and jurors very unwilling to convict. One case is instanced in *R. v. Smith* (4 Esp. 111), and another is continually occurring respecting the subject of this precedent; namely, the deposit of dung, fish, sea-weed, and other descriptions of manure for short periods near the places where they are collected, in order to be taken to neighboring fields for the improvement and promotion of agriculture. Large quantities of manure are frequently collected in large cities, and laid in heaps on the banks of canals and navigable rivers, for conveyance by barges and boats. In these and such like instances, the general benefit appears to counter-balance the local inconvenience, especially if the offensive matter remain no longer on each occasion than the necessity of the case requires. But see *R. v. Gore* (the Pudelock case), 8 D. P. C. 102; and *R. v. Pollock and others*, Q. B. Trin. 1838, Gas Works in Westminster, referred to by Mr. Starkie. Also *R. v. Ward*, 4 A. & E. 384; 6 N. & M. 38. It seems, however, that the maxim *sic utere tuo ut alienum non laedas*, applies as soon as the growth of human habitations near an offensive manufacture makes it injurious to them. See *Cooper v. Barba*, 3 Taunt. 110 (cited 1 B. & Ad. 880); *Bliss v. Hall*, 5 Scott, 500; 4 Bing. N. C. 183, S. C.; *Elliotson v. Feetham*, 2 Ib. 134; 2 Scott, 174. See *Flight v. Thomas*, 10 A. & E. 590; *Wh. Cr. L.* 8th ed. §§ 1415 *et seq.*

The open carrying on of scandalous or immoral trades, or keeping indecent brothels, gaming-houses, and disorderly places of resort of any kind, is an indictable nuisance; and in the case of brothels and gaming-houses, subjects the parties offending, in England, to the punishment of hard labor. 7 & 8 Geo. IV. c. 29, s. 4. And these are offences for which a married woman may be indicted, either separately or jointly with her husband; the charge being the criminal *management* of the house, which the law presumes to be principally in the woman's department. 4 Bla. C. 29; *R. v. Williams*, 1 Salk. 383. If a person, being only a lodger and having only a single room, makes use of it for the purpose of open and flagrant immorality, so as to annoy the neighbors, the occupier may be indicted for keeping a bawdy-house, as if the whole house was so tenanted. *R. v. Pierson*, 2 Ld. Raym. 1197; *Wh. Cr. L.* 8th ed. § 1449. But an indictment cannot be sustained in England against a woman for being a common bawd, and inducing parties to meet and commit fornication; for the bare solicitation of chastity is there not an offence at common law, but punishable in the ecclesiastical courts.

of the said commonwealth are constantly passing and repassing, and of divers dwelling-houses in the said county, inhabited and

Hawk. b. 1, c. 74. In this country, however, from the absence of ecclesiastical courts, the law is otherwise, as not only has the solicitation of chastity been regarded an independent offence (*State v. Avery*, 7 Com. 267, but see Wh. Cr. L. 8th ed. §§ 179, 1594, 1618), but all open immorality, whether consisting in public drunkenness or public lasciviousness, is indictable, as we will see, as a nuisance.

At common law, as will be seen, it is an indictable offence to keep a house of ill-fame for lucre (*Jennings v. Com.*, 17 Pick. 80); or to let a house, knowing it so to be used for the purposes of prostitution (*Com. v. Harrington*, 3 Pick. 26); though in New York the last point was ruled differently, and it was laid down that to rent a house to a woman of ill-fame, with the intent that it should be kept for purposes of public prostitution, is not an offence punishable by indictment, though it be so kept afterwards. *Brockway v. People*, 2 Hill, 558. But the doctrine held in the latter case was afterwards somewhat qualified, as it was declared that when it appears that the owner of lands has either erected a nuisance or continued it, or in any way sanctioned its erection or continuance, he is indictable. *People v. Townsend*, 3 Hill, 479. Owners of reversions are indictable for nuisance created by the occupier's use of premises calculated to create nuisance, if there be privity of contract between them; or where the reversion has been sold, if the former reversioner was liable; as in *R. v. Pedley*, 1 A. & E. 822; 3 N. & M. 627, a case in which sinks were left in a neglected state. 2 Ld. Raym. 1089; see *post*, 719; Wh. Cr. L. 8th ed. § 1422. Ground near a highway, within two miles of London, was kept for shooting at targets and at pigeons; in consequence of which numbers of persons assembled outside the ground, and in the fields adjacent, to shoot at those birds which escaped, causing thereby great noise and disturbance, and doing injury with the shots fired. The owner of the shooting ground was indicted for causing and occasioning such persons to assemble near and about his premises, discharging firearms and making a great noise and riot, whereby the king's subjects were disturbed and put in peril; and it was held that he was so indictable, as the acts of such persons were the probable consequences of his keeping a ground for shooting pigeons in such a vicinage, for which he is answerable as if it was his actual object. *R. v. Moore*, 3 B. & Ad. 184. Drawing together, by whatever means, numbers of disorderly persons, as by rope dancing and gaming houses, etc., cannot but be inconvenient to the neighborhood, and is indictable. Hawk. P. C. b. 1, c. 75, s. 6, 7; *Betterton's case*, 5 Mod. 142; *Skinner*, 625.

The making great noises in the night-time (*R. v. Smith*, 2 Stra. 704); exposing persons infected with contagious or loathsome diseases in public (*R. v. Vantandillo*, 4 M. & S. 73; see *infra*, 716); and keeping ferocious animals without proper control (*Burn's J., tit. Nuisance, I.*), are indictable nuisances.

In indictments in Massachusetts, it is said, it is sufficient to charge the defendant with keeping a "house of ill-fame," "a disorderly house," or "a common gaming-house." *Com. v. Pray*, 13 Pick. 359; 1 T. R. 754. An indictment charging the defendant with "keeping a disorderly house, and unlawfully procuring, for his lucre and gain, men and women of evil name and fame to frequent it at unlawful times, permitting them there to be and remain drinking, tippling, and misbehaving themselves, to the great damage and common nuisance of all the liege citizens," etc., is sufficient. *Com. v. Stewart*, 1 S. & R. 342. A verdict finding a defendant "guilty of keeping a disorderly house and disturbing his neighbors," is bad. *Hunter v. Com.*, 2 S. & R. 298 (but see *Com. v. Pray*, 13 Pick. 359; 1 T. R. 754). And where the defendant was indicted for keeping "a disorderly common tippling-house," and the jury found a special verdict "that the defendant, on one occasion, kept a house in which

occupied by divers other good citizens aforesaid (*here state the nuisance*), to the great damage and common nuisance of all the good citizens of this commonwealth, there inhabiting and residing, passing and repassing, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(706) *For carrying on the trade of a trunk-maker near to houses, so as to become a nuisance.*(i)

That A. B., late of, etc., on, etc., and on divers days and times between that day and the taking of this inquisition, at, etc., in a certain workshop there situate, near the dwelling-houses of divers citizens of the said state and also divers public highways, there unlawfully and injuriously did set up, exercise, and carry on the trade and business of a trunk-maker, and on, etc., and on the other days and times aforesaid, there at unseasonable hours in the morning and in the daytime, and at late hours of the nights of the days aforesaid, unlawfully and injuriously did make, and did cause and procure to be made, divers loud and annoying

there was a collection of twenty or thirty negroes more than belonged to the place, who got drunk, danced, and disturbed the neighborhood with noise and uproar;" it was held, that the facts found by the special verdict did not constitute the offence of keeping "a disorderly common tippling-house." *Dunnaway v. State*, 9 Yerg. 350. See Wh. Cr. L. 8th ed. §§ 1428, 1454. Where an indictment charged that the defendant was a common, gross, and notorious drunkard, and that he on divers days and times got grossly drunk, the judgment was arrested, for private drunkenness is not an indictable offence; it becomes so by being open and exposed to public view, so as to become a nuisance. *State v. Waller*, 3 Murph. 229. An indictment for a public nuisance, in frequenting and haunting houses of ill-fame, must expressly charge, that "the defendant, knowing the house to be a house of ill-fame, did openly and notoriously haunt and frequent the same." *Brooks v. State*, 2 Yerg. 482. See *per contra*, *State v. Cagle*, 2 Humph. 414.

On a presentment for open and notorious lewdness, it is no defence that the parties verbally contracted marriage and lived together as man and wife, according to the common law, if the marriage was not legal by local law. *Com. v. Munson*, 127 Mass. 459; *Grisham v. State*, 2 Yerg. 589.

It is said to be a misdemeanor to exhibit stud horses in a city. *Nolin v. Mayor*, 4 Yerg. 163.

An indictment, it was held in the days of slavery, lies against a master for permitting his slaves to pass about in the public highway in a state of nakedness. It is not necessary that it be proved that the slave did exhibit him or herself in such a state of nakedness by any command of the master. *Britain v. State*, 3 Humph. 203; but see Wh. Cr. L. 8th ed. §§ 247, 1432, 1503, etc.

In an indictment for exposing the person, it is sufficient, if it be charged to have been done "to public view in a public place." It is not necessary to aver that the prisoner was seen by citizens. *State v. Roper*, 1 Dev. & Bat. 208. Wh. Cr. L. 8th ed. §§ 1431, 1469.

(i) *Dickinson's Q. S.* 6th ed. 424.

sounds and noises, by then and there hammering and striking, and causing and procuring to be hammered and stricken, divers trunks and boxes made of wood, iron, and copper, and divers pieces of wood, tin, brass, copper, iron, and other metals, with divers large hammers and other instruments made of wood and iron, by reason whereof the good people of the said state residing in the said dwelling-houses near to the said workshop, on the several days and times aforesaid, were and still are greatly annoyed, disturbed, and incommoded in the use, occupation, and enjoyment of their said dwelling-houses, and greatly interrupted in the exercise and pursuit of their lawful business and transactions, and deprived of their natural sleep and rest and rendered and made in other respects uncomfortable, and thereby also the good people of the said state, in and through and along the common highway aforesaid, passing, repassing, and travelling, were and are greatly annoyed and disturbed; to the great damage, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(707) *For erecting a soap manufactory near a highway and dwelling-house.(j)*

That A. B., of, etc., on, etc., at, etc., near to a public street and common highway there, and also near to the dwelling-houses of divers citizens there situate and being, did unlawfully and injuriously erect and build, and cause and procure to be erected and built, a certain building for the purpose of making and manufacturing soap therein, and did unlawfully and injuriously make, set up, and place, and did cause and procure to be made, set up, and placed in the said building divers furnaces, stoves, cauldrons, coppers, and boilers, to wit (*here insert the number of each*), for the purpose of boiling, melting, and mixing tallow, soap-leeves, and other materials used in the making and manufacturing of soap; and that the said A. B. did, on the day and year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at, etc., unlawfully and injuriously boil, melt, and mix together, and did cause and procure to be boiled, melted, and mixed together in the said furnaces, stoves,

(j) This indictment is taken by Mr. Davis, *Precedent*, 191, from 2 Stark. C. P. 657; 2 Chit. 654, 655. Add, if necessary, another count for continuing the building, etc. For a precedent for this, see 2 Stark. C. P. 658.

cauldrons, and boilers respectively, so made, set up, and placed in the said building as aforesaid, divers large quantities of tallow, soap-lees, and other materials used in the making and manufacturing of soap, for the purpose of making and manufacturing the same into soap; and did then and there make and manufacture, and did cause and procure to be made and manufactured, divers large quantities of soap from the same tallow, soap-lees, and other materials; by reason of which said premises, divers noisome and unwholesome smokes, vapors, smells, and stench, on the days and times aforesaid, were emitted and issued from the said building, so that the air, on the several days and times aforesaid, at, etc., was thereby greatly filled and impregnated with the said smokes, vapors, smells, and stench, and was rendered and became, and was corrupted, offensive, and unwholesome; to the great damage and common nuisance of, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(708) *Nuisance by deleterious smoke and vapors.*(*k*)

That C. D., late of, etc., on the first day of June, in the year of our Lord and on divers other days and times between that day and the day of the finding of this indictment, at B., in the county of S., unlawfully and injuriously did erect, and cause and procure to be erected, certain furnaces and ovens for the burning of coke, and did then and there unlawfully and injuriously cause and permit great quantities of smoke, and of sulphurous and other noxious, unwholesome, and injurious vapors to arise from the said furnaces, and then and there to impregnate the air near and around the said furnaces, and then and there to enter the dwelling-houses there situate near the said furnaces; to the great damage and common nuisance of all persons then and there living and inhabiting near the said furnaces, and of all other persons then and there passing near the same, etc. (*Conclude as in book 1, chapter 3.*)

(709) *Nuisance by rendering water unfit to drink.*(*l*)

That C. D., late of, etc., on the first day of June, in the year

(*k*) 6 Cox, C. C. Appendix, p. lxxvi. See *R. v. Davey*, 5 Esp. 216.

(*l*) 6 Cox, C. C. Appendix, p. lxxvi. See *R. v. Medley*, 6 Carrington & Payne, 229.

of our Lord and on divers other days and times between that day and the day of the finding of this indictment, at B., in the county of S., did unlawfully and injuriously convey, and cause and suffer to be drained and conveyed, great quantities of noxious and offensive liquid matters, scum, and refuse, produced from the making of gas and of coal-tar and coke, from certain premises of the said C. D. there situate, into a certain ancient stream of pure water there situate and flowing, and did thereby then and there corrupt and render unwholesome the water of the said stream, and make the same unfit to drink; to the great injury and common nuisance of all persons then and there residing near the said stream, and of all other persons then and there using the water thereof, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(710) *For keeping gunpowder in a city.*(*m*)

That C. S. and L. S., late of, etc., on, etc., and on divers other days and times between that day and the day of taking this inquisition, with force and arms, at, etc., near the dwelling-houses of divers good citizens of the state, and also near a certain public street there, did (negligently and improvidently) keep, and still keep and maintain in a certain house, and then and there on the day and year aforesaid, at aforesaid, unlawfully and injuriously (negligently and improvidently), in the said houses did receive and keep, and still keep, fifty barrels of gunpowder (the said house being then and there insecure and unfit for the reception and detention of gunpowder as aforesaid), whereby divers good citizens there residing and passing are in great danger, to the damage and common nuisance of, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*m*) That portion of this form not in brackets was before the supreme court of New York, in *People v Sands* (1 Johns. 78), and its adequacy as an indictment at common law was examined with great learning by Kent, C. J., Spencer, Livingston, and Thompson, JJ. Judgment was arrested, though it was intimated that if the gunpowder had been charged to have been kept negligently and improvidently, there would have been enough on which to rest a verdict.

(711) *For keeping hogs in a city. First count, placing hogs in a certain messuage, etc., and feeding them, so as to generate a stench, etc.(n)*

That E. V., late of, etc., on, etc., at, etc., near to divers public streets, being the common highways of the said commonwealth, and also to the dwelling-houses of divers citizens of the said commonwealth then and there situate, did unlawfully, and without sufficient cause, place in a certain messuage or tenement, and in the appurtenances thereto, a great number of hogs, to wit, one thousand, and the said hogs then and there, to wit, on the said first day of March aforesaid, and on divers other times and seasons, unlawfully and injuriously did feed and cause to be fed with the offals and entrails of beasts and other filth, by means whereof divers noisome and unwholesome smells and stench during the time aforesaid, and large quantities of noxious and unwholesome smokes and vapors on the days and times aforesaid, then and there were emitted, sent forth, and issued from the same building; and the air in the neighborhood thereof, and for a great distance round, on the days and times aforesaid, was thereby greatly filled and impregnated with many noisome, offensive, and unwholesome smells, stinks, and stench, and has been corrupted and rendered very insalubrious, to the great damage and common nuisance, etc., to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(712) *Second count. Keeping hogs near the dwelling-houses of divers citizens, etc., and near the public highways.*

That the said E. V., at, etc., on, etc., and at divers other times and seasons between the day aforesaid and the taking of this inquisition, with force and arms, etc., near the dwelling-houses of divers good citizens of the said commonwealth, and also near

(n) *Com. v. Vansickle*, Brightly, R. 69; 7 Penn. L. J. 82; Wh. Cr. L. 8th ed. §§ 1412, 1415, 1416. This case was tried before Sergeant, J., at nisi prius, and a verdict of guilty was rendered, on which, however, there was no judgment, the nuisance being previously abated. The chief points taken on the indictment at the trial were, 1st. That there was a variance between the pleading and the evidence, the first averring that the hogs were fed on offals, etc., but the latter showing that they were fed on grain; and, 2d. That the remedy at common law was superseded by the act constituting the board of health. Both points were overruled by the court. See *supra*, 705, note.

divers public streets and common highways there situate, there did and yet doth keep a large number of hogs, to wit, one thousand; and the said hogs, on the days aforesaid, and the times and seasons aforesaid, unlawfully and injuriously did feed, and yet doth feed, with slop, fermented grain, the offal and entrails of beasts, and other filth, by reason whereof divers large quantities of noisome, noxious, and unwholesome smokes, smells, and stench, on the days and times aforesaid, then and there were emitted, sent forth, and issued, and the air thereabouts, on the days and times aforesaid, was thereby greatly filled and impregnated with many noisome, offensive, and unwholesome smells, stinks, and stench, and has been corrupted and rendered very insalubrious, to the great damage and common nuisance, etc., to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(713) *Third count, after overruling defendant to be the owner of a large building, etc., charges him with introducing into it great numbers of hogs, etc.*

That upon the day and year aforesaid, at the county aforesaid, there was and long before had been, and ever since hath been and still is, a certain house commonly called the "pigs' boarding-house," and a certain yard to the same house belonging, which said last mentioned house and yard are near and adjoining to the Schuylkill river, wherein a great number of the good citizens of the said commonwealth are constantly passing and repassing, and to divers public streets and highways within the city and county as aforesaid. And the inquest aforesaid do further present, that the said E. V., well knowing the premises last aforesaid to be close adjoining the highways and roads as aforesaid, upon the said first day of March as aforesaid, and at divers other times and seasons between that day and the taking of this inquest, with force and arms, etc., at the county aforesaid, that is to say, at the said last mentioned house commonly called the "pigs' boarding-house," and at and within the said yard thereto adjoining, did unlawfully gather and collect together a great number of hogs and pigs, to wit, the number of one thousand, to the common nuisance and great injury, etc., as aforesaid, and did then and there, at the times and seasons last aforesaid, un-

lawfully, wilfully, and injuriously lay, place, and put, and cause and procure to be laid, placed, and put, other great quantities of offals, entrails, and pieces of stinking carrion and dead carcasses of beasts, and other filth, together with great masses and loads of slop and of fermented grain, and other filth, slop, and trash, by reason whereof the air at and near the said house and yard, and the highways, public streets, dwelling-houses, and other buildings adjacent and contiguous thereto, at and upon the divers times and days last above mentioned, and between those times and days and the taking of this inquisition, at the county aforesaid, was and yet is filled, tainted, and impregnated with noxious, hurtful, and offensive stinks and smells, to the common nuisance and great injury, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(714) *For boiling bullock's blood for making colors, near the public ways.*(o)

That T. D., late of, etc., on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, at, etc., aforesaid, in a certain building belonging to the dwelling-house of the said J. B., there situate and being, and also near the dwelling-houses of divers citizens of the said state, and near divers public streets and common highways there, did unlawfully boil and cause to be boiled a great quantity of bullock's blood and other filth for the making and mixing of colors, whereby divers noisome and unwholesome smells, on, etc., aforesaid, and on the said other days and times during the time aforesaid, at, etc., aforesaid, did from thence arise, so that the air was thereby greatly corrupted and infected, to the great damage and common nuisance, etc.,(p) against, etc. (*Conclude as in book 1, chapter 3.*)

(715) *For keeping a distillery near public streets.*(q)

That A. B., etc., on, etc., and on divers other days, etc., at, etc.,

(o) Dickinson's Q. S. 6th ed. 426. See *supra*, 705, note. If the prosecutor be one of the persons whose comfort the annoyance particularly affected (and the indictment be moved by *certiorari*), and a conviction ensue, he will be entitled to his costs as a "party grieved," within 5 Wm. & Mary, c. 11, s. 3.

(p) Bac. Abr. tit. *Nuisances*; 16 East, 194; and *R. v. Heage* (Inhab.), 5 Esp. 217; *R. v. Davey*, *Ib.*

(q) This is the substance of the indictment in *People v. Cunningham*, 1 Denio, 525. See Wh. Cr. L. 8th ed. §§ 1412, 1415, 1428, 1474.

kept and maintained a distillery for manufacturing ardent spirits, and in so doing made large quantities of swill and slops, and unlawfully and wilfully caused and permitted divers carts, etc., with teams, to remain in Front street, which is averred to be a public street and highway near the distillery of the defendants, for the purpose of receiving the slops, etc., and that said street is and was during, etc., used for the people of the state with their horses, carriages, etc., to ride, drive, walk, etc., and that the defendants, on, etc., at, etc., in delivering the said slops, etc., into the said carts, etc., did unlawfully and wilfully make great quantities of offensive filth in and upon the said public street, etc., and did unlawfully and wilfully cause offensive smells and stenchs arising from the slops and from the horses, etc., used in the said carts, to issue, impregnating the air and rendering the same uncomfortable, and did unlawfully, etc., cause, permit, and suffer the said carts and the horses to be, remain, and continue in and upon the said street, etc., to wit, for six hours on each of the said days, whereby the common highway aforesaid then and on the said other days, etc., was obstructed, straitened, filthy, etc., so that the people, etc., could not pass, repass, etc., as they ought and were wont, etc.

(716) *For exposing a child, infected with smallpox, in the public streets.*(r)

That on, etc., E. R., an infant of tender age, to wit, about the age of four years, was infected, ill, and sick of and with a certain contagious, infectious, and dangerous disease and sickness called smallpox, at, etc. And that M. B., the wife of C. B., late of, etc., aforesaid, having the care and nurture of the said E. R., well knowing the premises aforesaid, afterwards, and whilst the said E. R. was so infected, ill, and sick as aforesaid, to wit, on, etc., aforesaid, with force and arms, at, etc., aforesaid, unlawfully and injuriously did take and carry the said E. R. into and along a certain open public street and passage called Market street, situate in the parish of St. John, in the town of N., in the county of N. aforesaid, used for all the good people of the said state on

(r) Dickinson's Q. S. 6th ed. 428. See *R. v. Vantandillo*, 4 M. & S. 73; *R. v. Sutton*, 4 Burr. 2116; *R. v. Henson*, Dears. C. C. 24; *R. v. Barret*, 4 M. & S. 272; see Wh. Cr. L. 8th ed. §§ 1436, 1606.

foot to go, return, and pass in, along, and through, in which said public street and passage there were divers good people of the said state, and near unto and by divers dwelling-houses, habitations, and residences of the good people of the said state then and there dwelling, inhabiting, and residing, and unto and into a certain common highway, situate and being in, etc., aforesaid, used for all the good people of the said state on foot and with coaches, carts, and carriages to go, return, pass, ride, and labor in, along, and through, in and along which said common highway there the good people of the said state were then going, returning, passing, riding, and laboring, and amidst and among the good people of the said state who then and there, to wit, in the same common highway, in the parish and county aforesaid, had met and assembled together; and that the said M. B. afterwards, and whilst the said E. R. was so infected, ill, and sick as aforesaid, to wit, on, etc., and on divers other days and times between that day and the day of in the same year, at, etc., aforesaid, wrongfully and injuriously did take and carry the said E. R. into and along the aforesaid open and public street and passage called, etc., and near unto and by the aforesaid dwelling-houses, habitations, and residences of the good people of the said state there dwelling, inhabiting, and residing, and also near unto and by the good people of the said state in the said open and public way and passage, on, etc., and on the said other days and times there being, to the great and manifest danger of infecting with said contagious, infectious, and dangerous disease and sickness called the smallpox, all the good people of the said state who, on the several days and times aforesaid, were in and near the aforesaid open and public way and passage, dwelling-houses, habitations, residences, and common highway, and who had not had the said disease; to the great damage and common nuisance, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said M. B., well knowing that the said E. R. was so infected, ill, and sick as aforesaid, afterwards, and whilst the said E. R. was so infected, ill, and sick, to wit, on the said, etc., and on divers other days and times between that day and the said, etc., in the same year, with force and arms, at, etc., afore-

said, unlawfully and injuriously did take and carry the said E. R. into and along the aforesaid open public highway and passage called, etc., situate and being, etc., and near unto and by the aforesaid dwelling-houses, habitations, and residences of the good people of the said state there dwelling, inhabiting, and residing, and also near unto and by the good people of the said state in the said open public way and passage, on, etc., and on the said other days and times as last mentioned, there being, to the great and manifest danger of infecting with the said contagious, infectious, and dangerous disease and sickness called the small-pox, the good people of the said state, who, on the said, etc., and on the said divers other days and times last mentioned, were in the said open and public way and passage, and who dwelled, inhabited, and resided there and near thereto, and who were liable to take the said disease and sickness, to the great damage and common nuisance, and against, etc. (*Conclude as in book 1, chapter 3.*)

(717) *Against a parent for not giving his deceased child a proper burial.(s)*

That whereas, heretofore, to wit, on the eighteenth day of August, in the year of our Lord William Vann, late of the parish of Saint Margaret, in the borough of Leicester, laborer, was the father of a certain child then lately deceased, and had then and there the care and custody of the dead body thereof; and whereas, on the day and year aforesaid, at the parish aforesaid, in the borough aforesaid, it became and was the duty of the said William Vann, the father of the said child lately deceased as aforesaid, the dead body thereof to bury and inter according to the rules of public decency, the said W. V. then and there having ample and sufficient money and means to defray the necessary expenses of said burial and interment; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said William Vann, having as aforesaid the care and custody of the dead body of his child then lately deceased, afterwards, to wit, on the nineteenth day of August, and at divers

(s) See *R. v. Vann*, 2 Denison, C. C. 325; 5 Cox, C. C. 379; 8 Eng. Law & Eq. 569; Wh. Cr. L. 8th ed. §§ 130, 331, 1432a.

other times in the year aforesaid, at the parish aforesaid, in the borough aforesaid, with force and arms, against his duty in that respect, the said dead body did unlawfully, wrongfully, and wilfully refuse, omit, and neglect to bury and inter, whereby and by reason of the decomposition of the said dead body while in his care and custody as aforesaid, and while remaining unburied in the dwelling-house of the said William Vann there situate and being, divers, various, and noxious and unwholesome smells and stenches did then and there arise and issue therefrom, and thereby the air was greatly infected and corrupted, and was rendered and became for several days offensive, unwholesome, injurious, and dangerous to health; to the great damage and common nuisance of all the citizens of said state, there inhabiting, being, and residing, and going, returning, and passing, to the evil example of all others in like case offending, against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that William Vann, late of the parish of Saint Margaret, in the borough of Leicester, laborer, on the twentieth day of August, in the year of our Lord having the care and custody of the dead body of a certain child then lately deceased, to wit, of the child of the said William Vann, on the day and year last mentioned, at the parish aforesaid, in the borough aforesaid, the said dead body, with force and arms, and against his duty in that respect, unlawfully did refuse, omit, and neglect to bury, the said W. V. then and there having sufficient money and means to defray the necessary expenses of the burial and interment of said body, and the said dead body did then and there remove from the dwelling-house of the said William Vann there situate, to a certain public place, to wit, a public yard there situate, near to and adjoining divers public streets, being the common highway, and also near to and adjoining the dwelling-houses of divers citizens of said state there situate, and the said body so removed as aforesaid, and so as aforesaid in his care and custody, did then and there unlawfully and injuriously permit and cause to be and remain in the said public yard there situate as aforesaid, for a long space of time, to wit, for and during the space of six days,

whereby and by reason of the noxious smells, stenches, and vapors arising and issuing from the said dead body during the time aforesaid, the air became and was greatly infected and corrupted, and became and was rendered offensive, injurious, and unwholesome; to the great damage and common nuisance not only of all the citizens of said state, then and there being, inhabiting, and dwelling, but also of all other citizens of said state, near there being, inhabiting, and dwelling, and also of all other citizens of said state, in, by, and through the said public yard, and in, by, and through the other said public streets and highways near thereto going, returning, passing, repassing, and laboring, to the evil example of all others in like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that William Vann, late of the parish of Saint Margaret, in the borough of Leicester, laborer, on the day and year last before mentioned, having the care and custody of the dead body of a certain child then lately deceased, to wit, the child of the said William Vann, at the parish aforesaid, in the borough aforesaid, the said dead body, with force and arms, did unlawfully, wilfully, and against his duty in that respect, omit, neglect, and refuse to bury, and the said dead body, unlawfully, injuriously, and against the rules of public decency in that respect, in a certain public place, to wit, a public yard, there being and situate, and near unto divers public streets, being the common highways, and also near unto the dwelling-houses of divers citizens of said state, there situate and being, did then and there keep and retain, and cause to be kept and retained, for the space of several days, and the said dead body, so kept and retained by the said William Vann as aforesaid, became and was putrid, by reason of which said premises, and during the time aforesaid, divers noxious, unwholesome, and offensive smells, stenches, and vapors were from thence emitted and issued, so that thereby the air then and there was rendered and became offensive, injurious, and unwholesome, and thereby continued during the time aforesaid to be offensive, injurious, and unwholesome; to the great damage and common nuisance of all the citizens of said state there inhabit-

ing, being, and residing, and going, returning, and passing through the said streets and highways, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(718) *For bringing a horse infected with the glanders into a public place.*(t)

First count.

That James Henson, late of Melton Mowbray, in the county of Leicester, laborer, on the first day of June, in the year of our Lord at Melton Mowbray aforesaid, in the county aforesaid, was possessed of a certain mare, which said mare was then and there infected with a contagious, infectious, and dangerous disease called the glanders, which disease was then and there communicable to man, as the said J. H. then and there knew, and the said James Henson, well knowing the premises, afterwards, and whilst the said mare was so infected as aforesaid, on the day and year aforesaid, with force and arms, at Melton Mowbray aforesaid, in the county aforesaid, unlawfully, wilfully, wickedly, and injuriously did bring, and cause to be brought, the said mare, so infected as aforesaid, into and along a certain open public way and place, on which then of right were divers citizens of said state, then going, passing, and staying, and amidst and among divers citizens of said state, who were then and there in the said public way and place, to the great danger of infecting with the said contagious, infectious, and dangerous disease called the glanders, the citizens of said state, who, on the said day and time, were in and near the said public way and place, to the damage and common nuisance of all the said citizens of said state, to the evil example of all others in the like case offending, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year aforesaid, at Melton Mowbray aforesaid, in the county aforesaid, the said James Henson was possessed of a certain other mare, which

(t) See *R. v. Henson*, Dears. C. C. 24; 18 Eng. Law. & Eq. Rep. 107. Wh. Cr. L. 8th ed. § 1436.

said last mentioned mare was then and there infected with a contagious, infectious, and dangerous disease, to wit, a disease called the glanders, which disease was then and there communicable to man, as the said J. H. then and there well knew, and that the said James Henson, well knowing the premises last aforesaid, and whilst the said last mentioned mare was so infected as aforesaid, on the day and year aforesaid, with force and arms, at Melton Mowbray aforesaid, in the county aforesaid, unlawfully, wickedly, and injuriously did bring, and cause to be brought, the said last mentioned mare, so infected as aforesaid, into a certain fair called the Melton Mowbray Whitsun Fair, during the period when the citizens of said state were then and there holding the said fair, which was then and there public and open to all the citizens of said state, for the purpose of buying and selling horses, and other cattle therein, and that the said James Henson, well knowing the premises as last aforesaid, then and there kept, and continued to keep, the said mare, so infected as aforesaid, for a long space of time, to wit, for the space of one hour then next following, and in which said fair then, of right, were divers horses and other cattle of certain citizens of said state, then and there passing and being, by means of which said several last mentioned premises, the said last mentioned horses, and other cattle, so passing and being along and in the said fair, became and were liable to be infected by the contagious, infectious, and dangerous disease with which the said mare of the said James Henson was so infected as aforesaid; to the damage and common nuisance of the citizens of said state, frequenting the said fair, and using the same for the purpose of buying and selling horses and other cattle therein, to the evil example of all others in the like case offending, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, on the day and year aforesaid, at Melton Mowbray aforesaid, in the county aforesaid, the said James Henson was possessed of a certain other mare, which last mentioned mare was then and there infected with a contagious, infectious, and dangerous disease, to wit, a disease called the

glanders, which disease was then and there communicable to man, as the said J. H. then and there well knew, and that the said James Henson, well knowing the last mentioned premises, afterwards, and whilst the said last mentioned mare was so infected as aforesaid, on the day and year aforesaid, with force and arms, at Melton Mowbray aforesaid, in the county aforesaid, unlawfully and injuriously did bring, and cause to be brought, the said last mentioned mare, so infected as aforesaid, into a certain open and public way and place, called the Burton End, in Melton Mowbray aforesaid, in which public way and place there were divers other horses and other cattle of certain citizens of said state, then and there passing and being, and that the said James Henson, well knowing the premises aforesaid, then and there kept and continued the said mare of which the said James Henson was so possessed, as last aforesaid, and which was then and there so infected as aforesaid, for a long space of time, to wit, for the space of one hour then next following, during all which time there were divers other horses and other cattle of certain citizens of said state, then and there passing and being, by means of which said several last mentioned premises, the said horses and other cattle, so passing and being along and in the said open and public way and place, became and were liable to be infected by the contagious, infectious, and dangerous disease with which the said mare of the said James Henson was so infected as aforesaid; to the damage and common nuisance of the citizens of said state, then having horses and other cattle in the said open and public way and place, to the evil example of all others in the like case offending, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(719) *Against owner of land for erecting offensive buildings.*(u)

That the defendant, on, etc., at a certain place commonly called Diamond Alley, near unto divers public streets and dwell-

(u) *R. v. Pedly*, 1 A. & E. 822. The second count charged the defendant with continuing the necessary and sink before that time made, etc., by persons unknown, and laid the nuisance as before. The third count charged that the defendant near, etc. (as before), did put, place, and leave, and did cause and procure to be put, placed, and left, divers large quantities of ordure, etc. The fourth count charged the defendant with permitting and suffering the nuisance (as in the third count, except that the nuisance was said to be created by persons

ing-houses, unlawfully did make, erect, and set up two buildings called necessary houses, for the common use of divers persons residing in and frequenting Diamond Alley, and did also make and cause to be made a certain open sink for the reception of ordure, etc., and that then and there, and on divers other days and times between, etc., divers persons residing in and frequenting Diamond Alley, did resort to and use, and yet do resort to and use, the said necessary houses, and did place and leave, and caused to be placed and left, in the said open sink, divers large quantities of ordure, etc., by reason of which, etc. (*stating the nuisance resulting*).

(720) *For keeping a privy in a street.*(v)

That O. W., late of, etc., yeoman, on, etc., and from that day until the day of finding this inquisition, at, etc., unlawfully and obstinately did keep and maintain, and yet doth keep and main-

unknown) to remain. On the trial before Lord Denman, C. J., it was proved that the defendant was in the receipt of the rents of twelve dwelling-houses, which were let for short periods to tenants, and that two necessary houses and a sink belonging to them, were used in common by the persons occupying the dwelling-houses. It did not appear whether any of the present tenants commenced occupying the dwelling-houses before the defendant began to receive the rents; but the necessary houses and sink were constructed and used by the tenants of those premises before his time. There was no distinct proof of any actual demise of the necessary houses and sink, but they had regularly been cleansed by the persons occupying the dwelling-houses, until the time of the nuisance, when the cleansing had been neglected. The nuisance had arisen since the defendant began to receive the rents. The only method of draining the places from which the nuisance proceeded would be to cut through a close belonging to the defendant. Some evidence was given to show an implied admission by the defendant that he himself was bound to do the cleansing. The jury, under the direction of the chief justice, found a verdict of guilty; subject to a motion for setting aside the verdict and entering an acquittal.

The conviction was sustained by the court, it being ruled generally that if the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term, and that the same principle extended to cases where he lets a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant. It was declared by Littledale, J., that if a party buy a reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such reversioner relet, or, having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance, and that such purchaser is liable to be indicted for the continuing of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the tenant's interest, or abating the nuisance.

(v) This form has been sustained in Philadelphia.

tain, near one of the public streets in the said city, to wit, High or Market street, and also near the dwelling-house of C. B. and A. T., and of divers other citizens of the said city there situate, a certain privy or house of office, and from the filth and human excrement therein contained divers fetid, nauseous, hurtful, pernicious, and unwholesome smells, on the days and times aforesaid, did and still do arise and proceed, whereby the air there was and still is corrupted, fetid, and infected, and the health of the said C. B. and A. T., and divers other good citizens of this commonwealth there inhabiting, residing, and passing, has been and still is endangered and impaired, to the great damage and common nuisance, etc., there inhabiting, residing, and passing, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(721) *For keeping a privy near an adjoining house.(w)*

That W. R., late of, etc., yeoman, on, etc., and from that day until the finding of this inquisition, at, etc., did keep and maintain, and yet doth keep and maintain, unlawfully and obstinately, near the dwelling-houses of divers citizens of the state there situate and adjoining the dwelling-house of one P., a certain privy and house of office, so filled with filth, dung, and human excrement, that the same flowed, issued, and came, and yet do flow, issue, and come through the walls of and into the said dwelling-house so adjoining as aforesaid, and by reason whereof divers fetid, noisome, and unwholesome smells, during the time aforesaid, did, and yet do arise, and the air thereby was and still is greatly corrupted and infected, to the great damage and common nuisance of all the liege citizens of this state thereabouts resident, to the evil example, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

DISORDERLY AND GAMING HOUSES.

(722) *Disorderly house, etc. Form used in New York.*

That A. B., late of, etc., laborer, on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, at the city and ward in the county aforesaid,

(w) Drawn in 1789 by Mr. Bradford, then attorney-general of Pennsylvania.

did keep and maintain, and yet keep and maintain, a certain common, ill-governed, and disorderly house, and in said house, for own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, to frequent and come together, then and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said men and women, in said house, at unlawful times, as well in the night as in the day, then and on the said other days and times, there to be and remain, drinking, tippling, gambling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet permit, to the great damage and common nuisance of the people of the state of New York, there inhabiting, residing, and passing, to the evil example, etc., against, etc.(x) (*Conclude as in book 1, chapter 3.*)

(x) The following proceedings took place in *State v. Champeau*, 52 Vt. 313, on an indictment for keeping a house of ill-fame. The respondent pleaded that the names of three of the persons who acted as the grand jury by which the indictment was found, residents of the city of Burlington, and summoned as such, were not drawn out of the box containing the names of the persons nominated, but were drawn by the sheriff "by selecting from a package of numbered cards presented to him by the city clerk of said city three certain numbers seen by said sheriff at the time of said drawing, which numbers so drawn corresponded with the numbers set opposite the names" of said three persons in the public records of the proceeding of the board of alderman of said city, and "not drawn or selected in any other way." The state replied that before said drawing the names of the persons nominated and agreed upon to serve as grand jurors were duly entered in said records with a particular number to each name; that said numbers were written by the city clerk on separate pieces of paper, which were put into a box appropriate for the purpose of keeping the names of grand jurors, which was kept in his office for that purpose; that among those names were the names of the three persons in the plea mentioned; that "on such drawing" the sheriff repaired to said clerk's office, where the clerk, in his presence, and by his consent and direction took from said box all said pieces of paper, and laid them on a table before the sheriff, with the numbers on the under side, and so that they were concealed from the sheriff, and the sheriff "selected by lot from all such pieces of paper three of said pieces which bore the several numbers corresponding to the names" of said three persons; that the sheriff thereupon, without knowing what names such numbers indicated, verified them and ascertained the names thereby designated by examination of the records, and summoned said three persons. The respondent demurred. The court, Powers, J., presiding, overruled the demurrer, rendered judgment of *respondent ouster*; to which the respondent excepted.

The respondent then pleaded not guilty, and a trial was had by jury. The indictment charged the commission of the offence from July 1, 1877, to the time of the finding of the indictment on September 24, 1879. The state offered evidence "tending to establish the charge of the indictment prior to September 30, 1878." The respondent objected to its admission, for that, at the September term, 1878, she was put upon trial before a jury on a plea of not guilty to an information charging the same offence, as committed between January 5 and September 30,

(723) *Second count. Gaming-house, etc.*

That the said A. B., afterwards, to wit, on the said day of in the year aforesaid, and on divers other days and times as aforesaid, with force and arms, at the ward, city, and county aforesaid, a certain common gaming-house, there situate, for lucre and gain, unlawfully and injuriously did keep and maintain, and in the said common gaming-house, there unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to be and remain in the said common gaming-house, and to game together, and play at cards, dice, and billiards (*adding other games, etc.*), for money, on the said day of in the year one thousand eight hundred and aforesaid, and on the said other days and times, there did unlawfully and injuriously procure, permit, and suffer; and the said persons, in the said common gaming-house, there on the day of aforesaid, and on the said other days and times, by such procurement, permission, and sufferance of the said A. B., did game together and play at cards, dice, and billiards (*as above*) for money, to the great damage and common nuisance of all the people of the state of New York, and against, etc. (*Conclude as in book 1, chapter 3.*)

(724) *Disorderly house. Form in use in Massachusetts.*

That A. B., of Boston aforesaid, yeoman, on, etc., at, etc., and on divers other days and times, as well before as since, (*y*) did keep and maintain a certain common house of ill-fame there situate, resorted to for the purpose of prostitution and lewdness;

1878, and that, after evidence had been introduced, "the court permitted" an entry of *nolle prosequi*. The court found the facts to be as indicated by the objection, but ruled that those proceedings did not preclude proof of facts tending to show the commission of acts within the time covered by that information. To that ruling the respondent excepted. Verdict of guilty. It was held by the supreme court, that although the drawing was not strictly in accordance with the statute, yet as the persons drawn were among those who had been regularly nominated, etc., and were, so far as appeared, proper persons to be drawn, and as there was no appearance of any wrong or fraud, the irregularity would not vitiate an indictment by a grand jury of which such persons were a part. It was further held that the *nolle prosequi*, which was entered by permission of the court on the previous indictment, was no bar to a second indictment for the same offence.

(*y*) See *Wells v. Com.*, 12 Gray, 326.

and in said house, for own lucre and gain(z) certain persons, whose names to said jurors as yet are not known, as well men as women, of evil name and fame, and of dishonest conversation,(a) to frequent and come together then, and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said men and women in said house at unlawful times, as well in the night as in the day, then and on said other days and times, there to be and remain whoring (*insert other acts of disorder, as the facts may be*), and otherwise misbehaving themselves, unlawfully and wilfully did permit and suffer, to the great injury and common nuisance, etc., against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(724a) *Another form.*

That C. B., on, etc., at, etc., "and on divers other days and times between said last-mentioned day and the day of finding this indictment, at said M., did keep and maintain a certain common, ill-governed, and disorderly house there situate, and in the said house, for his own lucre and gain, certain evil disposed persons whose names to said jurors as yet are not known, of evil name and fame and conversation, to frequent and come together, then, and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said persons in the said house, as well in the night as in the day, then, and on said other days and times, there to be and remain, drinking, tippling, cursing, swearing, quarrelling, making great noises, and otherwise misbehaving themselves, then and there unlawfully and knowingly did permit and suffer; to the great injury and common nuisance of all the citizens of said commonwealth there being, residing, passing, and repassing, and against the peace," etc.(a) (*Conclude as in book 1, chapter 3.*)

(725) *For keeping a common bawdy-house in Massachusetts.(b)*

That A. B., of, etc., laborer, on, etc., and on divers other days

(z) These allegations may be dispensed with. *Com. v. Ashley*, 2 Gray, 356.

(a) This was held good at common law for keeping a disorderly house; and it was held no variance that the defendant kept only a single story in the building. *Com. v. Bulman*, 118 Mass. 456.

(b) 2 Chit. 40; Cro. C. C. 302 (8th ed.). See note (b) 2 Chit. 40, where it

and times as well before as afterwards, to the day of taking this inquisition, at, etc., a certain common house of ill-fame, unlawfully and wickedly did keep and maintain; and the said house, for the sake of lucre and gain, divers evil disposed persons, as well men as women, and common prostitutes, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain; and in which house the said evil disposed persons and common prostitutes, by the consent and procurement of the said A. B., on the days and times aforesaid, there did commit whoredom and fornication; whereby divers unlawful assemblies, riots, affrays, disturbances, and violations of the peace of the said commonwealth, and lewd offences, in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated; to the great damage and common nuisance, etc.^(c) in manifest destruction and subversion of, and against good morals and good manners, and against, etc.^(d) (*Conclude as in book 1, chapter 3.*)

(726) *Against keeper of house of ill-fame.* Rev. Sts. Mass. ch. 130, § 8; stat. 1849, ch. 84.^(e)

That C. D., late, etc., on, etc., at B. aforesaid, in the county aforesaid, and on divers other days and times between that day and the day of the finding of this indictment, at B. aforesaid, in the county aforesaid, did keep a certain house of ill-fame, then

is said that this is the common printed form used in England. "It is not necessary," says Mr. Davis, Prec. 193, "to state particulars; as the names of those who frequented the house. 2 Burr. 1832; 1 T. R. 752, 754. But evidence of particular instances of illicit intercourse may be given in evidence under the general charge. If the person be only a lodger and make use of her room for disorderly purposes, she would be responsible." See *supra*, 705, note; Wh. Cr. L. 8th ed. § 1449.

(c) See *Wells v. Com.*, 12 Gray, 326.

(d) This count is sustained in *Jennings v. Com.*, 17 Pick. 81; and it was held that the common law misdemeanor it specified did not merge in the offence created by Stat. 1793, ch. 59, § 8. A second count was added of the same structure, with the exception of the omission of the averment of lucre. Whether or no this averment was essential it was not necessary to decide, as there was already one clearly good count with which to support the verdict. I apprehend, however, that the averment can be safely dispensed with in those cases where the evidence does not support it, as the non-acceptance of money certainly does not lessen the outrage committed on the morals and peace of the community.

(e) This was sustained in *Com. v. Ashley*, 2 Gray. See Tr. & H. Prec. 329.

and there resorted to for the purpose of public prostitution and lewdness; against, etc. (*Conclude as in book 1, chapter 3.*)

(726a) *Keeping house of ill-fame, under Mass. stat. 1855, ch.*
405.(f)

That A. B. and C. D., at, etc., on the first day of June, eighteen hundred and fifty-seven, and on divers other days and times between the said first day of June and the first day of October, eighteen hundred and fifty-seven, at said Boston, did knowingly keep and maintain a certain common nuisance, to wit, a certain building, to wit, a house of ill-fame, then and on said other days and times, there situate, on North street, in said Boston, numbered one hundred and fifty-eight, and then and on said other days and times thereby there kept and used as a house of ill-fame, and then and on said other days and times there resorted to for the purpose of prostitution and lewdness; and that the said A. B. and C. D., in said house, for their own lucre and gain, certain persons, whose names to said jurors as yet are not known, as well men as women of evil name and fame and of dishonest conversation, to frequent and come together, did then and on said other days and times there unlawfully and wilfully cause, permit, and procure, and said men and women in said house, as well in the day as in the night, then and on said other days and times, there did suffer and permit to be and to remain whoring; to the common nuisance of all good citizens then and on said other days and times there residing, passing, and being, and in evil example to all others in like case offending, against, etc. (*Conclude as in book 1, chapter 3.*)

(727) *Keeping brothel in Hamilton county, under Ohio statute.*

That A. B., on the first day of September, in the year of our Lord one thousand eight hundred and fifty-three, in the county of Hamilton aforesaid, did unlawfully keep a brothel, otherwise called a house of ill-fame, by then and there keeping therein divers, to wit, five, female persons, whose names are to the jurors aforesaid unknown, for the purpose of prostitution, and by then and there suffering divers, to wit, five, other female persons,

whose names are to the jurors aforesaid unknown, to resort thereto for the purpose of prostitution, etc.(g)

(728) *Keeping disorderly tavern, under Ohio statute.*

That A. B., on the fourth day of March, in the year of our Lord one thousand eight hundred and forty-eight, at his house, in the town of Zanesfield, in the county of Logan aforesaid (he the said A. B. being then and there duly licensed to keep a tavern, at his house aforesaid, in the town and county aforesaid), unlawfully and wickedly did permit and allow rioting, revelling, and intoxication, drunkenness, swearing, gambling, and fighting in his house aforesaid, and on his premises aforesaid, by M. N., O. P., R. S., and T. W., and other persons to the affiant unknown, he, the said A. B., then and there being a duly licensed tavern-keeper, at his house aforesaid, in the county aforesaid, contrary, etc.(h)

(729) *Disorderly house. Form used in Philadelphia.*

That A. B., late of, etc., yeoman, on, etc., and on divers days and times between that day and the day of the taking of this inquisition, with force and arms, at the county aforesaid, and within the jurisdiction of this court, did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed, and disorderly house; and in said house for own lucre and gain, certain persons, as well men as women of evil name and fame and of dishonest conversation, to frequent and come together then, and on the said other days and times, there unlawfully and wilfully did cause and procure, and the said men and women in said house, at unlawful times, as well in the night as in the day, then, and on the said other days and times, there to be and remain drinking, tippling, and otherwise misbehaving themselves, unlawfully and wilfully did permit and suffer, and yet doth permit and suffer, to the great damage and common nuisance, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(g) Warren's C. L. 340.

(h) Warren's C. L. 367.

(730) *Second count. Tippling-house.*

That the said A. B., on the same day and year aforesaid, at the county aforesaid, and within the jurisdiction of the same court, did sell and retail, and cause to be sold and retailed, within the said county, less than one quart of rum, wine, brandy, and other spirituous and vinous liquors, then and there delivered at one time and to one person, and to more than one person, without having first obtained license agreeably to law for that purpose, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(731) *Another form for same.(i)*

That defendant, on, etc., at, etc., and on divers other times and seasons between that time and the taking of this inquisition, kept, etc., a disorderly and ill-governed house, and did then and there unlawfully cause and procure, for his own lucre and gain, certain persons, as well men as women of evil name and fame, and of dishonest conversation, to frequent and come together in his said house, at unlawful times, as well in the night as in the day, and did permit them there to be and remain, drinking, tippling, and misbehaving themselves, to the great damage and common nuisance, etc., to the evil example, etc.

(732) *Disorderly house, under Vermont Rev. Sts. ch. 99, § 9.(j)*

That G. N., late of, etc., on, etc., and on divers other days and times between that day and the day of taking this inquisition,

(i) *Com. v. Stewart*, 1 S. & R. 343. *Wh. Cr. L.* 8th ed. §§ 1430, 1450. "The case of *The King v. Higginson*, 2 Burr. 1232," said Tilghman, C. J., in examining the count, "is very much like this. The only difference is that instead of drinking, tippling, etc., Higginson is charged with procuring persons to come to his house, and permitting them to remain there 'fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, to the great damage and common nuisance, etc.'" The same objection was made to that indictment, yet it was held good. Besides, it is of great weight that this form of indictment is of ancient date in this state, and there have been many convictions under it. I am therefore of opinion that it is sufficient." See also *Hunter v. Com.*, 2 S. & R. 298.

(j) "After a careful perusal of this indictment," said the supreme court of Vermont, in *State v. Nixon*, 18 Vt. 70, "we see no reason to doubt its sufficiency." The keeping a house of ill-fame, it was ruled, is a local offence, and must be described in an indictment as committed in a particular town, and the prosecutor is confined in his proof to the town, and cannot, as in other cases, prove an offence within the county; but a more particular description of the house is not required.

with force and arms, at, etc., in the county of Chittenden aforesaid, feloniously a certain house of ill-fame, commonly called a bawdy house, resorted to for the purposes of prostitution and lewdness, unlawfully and wickedly did keep and maintain, and in the said house, for filthy lucre and gain, divers evil disposed persons, as well men as women and whores, on the days and times aforesaid, as well in the night as in the day, there unlawfully and wickedly did receive and entertain, and in which said house the said evil disposed persons and whores, by the consent and procurement of the said G. N., on the days and times aforesaid, there did commit whoredom and fornication, whereby divers unlawful assemblies, riots, routs, affrays, disturbances, and violations of the peace, and dreadful, filthy, and lewd offences in the same house, on the days and times aforesaid, as well in the night as in the day, were there committed and perpetrated, to the great damage and common nuisance, etc., to the evil example, etc., in manifest destruction and subversion of morality and good manners, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(733) *Keeping a disorderly house, and fighting cocks, etc., at common law.*(k)

That P. Q., late of, etc., and R. S., late of, etc., on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, did keep and maintain, and yet do keep and maintain, a certain common, ill-governed, and disorderly house, and in the said house, for their own lucre and profit,(l) certain evil and ill-disposed persons of ill-name and fame,(m) and of dishonest conversation, to frequent and come to-

(k) Dickinson's Q. S. 6th ed. 424. Cock-fighting was prohibited as in itself an illegal pastime (in 39 Ed. III. ; see 11 Rep. 87) ; and an indictment will lie for it at common law. *Squires v. Whisen*, 3 Campb. 148 ; *R. v. Higginson*, 2 Burr. R. 1233. See also penalties inflicted by 5 & 6 Wm. IV. c. 59, s. 3 ; and 2 & 3 Viet. c. 47, s. 47, for keeping cock-pits. See 2 Shower, 38 ; 4 Com. Dig. tit. *Justices of the Peace* (B. 42) ; Bac. Abr. Gaming (A. 2). Wh. Cr. L. 8th ed. § 1461.

(l) An indictment for abduction of a girl having a portion of £1300 (against 3 Hen. VII. c. 2) laid the offence, "for lucre of the gain of the said portion" (Fulwood's case, Cro. Car. 483) ; for "lucre and luxuriousness are the ends of such an act." *Ib.* 485 ; Dickinson's Q. S. 6th ed. 425.

(m) Need not be named, *R. v. Higginson*, 2 Burr. 1233 ; from which this form is taken. Dickinson's Q. S. 6th ed. 425.

gether, then, and the said other days and times, there unlawfully and wilfully did cause and procure, and the said persons in the said house then, and the said other days and times, there to be and remain, fighting of cocks, boxing, playing at cudgels, and misbehaving themselves, unlawfully and wilfully did permit, and yet do permit; to the great damage and common nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(734) *Disorderly house. Form used in South Carolina.*

That A. B., on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at, etc., unlawfully did keep and maintain a certain common, ill-governed, and disorderly house, situate in the district and state aforesaid; and in the said house, for the lucre and gain of the said A. B., certain persons, as well men as women, of evil name and fame, and of dishonest conversation, then and on the said other days and times, there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women, in the said house of the said A. B., then, and on the said other days and times, as well in the night as in the day, there to be and remain, drinking, tippling, whoring, and misbehaving themselves, unlawfully and wilfully did permit, and yet doth permit; to the great damage and common nuisance, etc., to the great displeasure, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(734a) *Information in Florida for keeping house of ill-fame.*

In the circuit court, etc. Escambia county, to wit: Be it remembered, that W. H. M., state attorney for the first judicial circuit of, etc., prosecuting for said state, being present in said court on the, etc., day of, etc., gave the court to be informed and understand, that one M. K., late of the county of, etc., aforesaid, in the circuit and state aforesaid, on the first day of, etc., then and there being in the county of, etc., then and there at said time, and on divers other days and times between that day and the filing of this information, unlawfully did keep a house of ill-fame, resorted to for prostitution and lewdness, and the said M. K., certain persons, as well men as women, of evil

name and fame, and of dishonest conversation, then, and on the said other days and times, there unlawfully and willingly did cause and procure to frequent and come together, and the said men and women, in the said house of her, the said M. K., at unlawful times, as well in the night as in the day, then, and on the said other days and times, there to be and remain, drinking, tippling, whoring, and misbehaving themselves, unlawfully did permit and yet doth permit, against the form of the statute in such cases made and provided, to the evil example of all others in the like case offending, and against the peace and dignity of the state of, etc.; wherefore the said W. H. M., the state attorney as aforesaid, prosecuting for said state as aforesaid, prays the advice of the said court in the premises, and that the said M. K. may be arrested and held for trial under the foregoing information, and that a capias may issue forthwith for her arrest.

W. H. M.,
State attorney for, etc.(n)

(735) *Letting house to a woman of ill-fame, at common law.*(o)

That R. H., of, etc., physician, on, etc., at, etc.,(p) did let out

(n) Sustained in *King v. State*, 17 Fla. 183.

(o) *Com. v. Harrington*, 3 Pick. 26, Wh. Cr. L. 8th ed. § 1459. Parker, C. J., said in substance, "that the court were of opinion that there was nothing in the first objection to the conviction, namely, that the lease was not proved to have been made on the day alleged in the indictment. Time does not enter into the constitution of the offence, and this case differs, therefore, from an indictment for usury, where it is necessary to set forth the time of making the usurious contract.

"The principal objection, however, was that the facts alleged do not constitute an indictable offence. It is found that the defendant let the house to a woman of ill-fame, knowing her to be such, with the intent that it should be used for the purposes of prostitution, and that it was so used. There is no statute against such an offence, and the question then is, whether it is indictable at common law. It has been compared to cheating on false pretences, which was not indictable at common law, and which has been made so by a statute. But the cases are different, inasmuch as cheating acts only upon the individual defrauded; whereas this offence is of a public nature, and obviously injurious to the public morals. The real question is, whether exciting, encouraging, and aiding one to commit a misdemeanor, is not of itself a misdemeanor. And we find that it has been held so to be in the case of *The King v. Phillips* (6 East, 464), in which it was decided, that an endeavor to provoke another to commit the misdemeanor of sending a challenge to fight, is itself a misdemeanor: it being the object of the law to prevent the commission of offences. On this

(p) It is necessary to aver a date for the making of the lease. *Com. v. Moore*, 11 Cush. 600.

and accommodate a certain room in the house of him said H., in Elliott street, so called, in said Boston, for his own gain and reward, and for a certain rent and sum of money to him to be paid therefor, to one S. B., with intent and design that she the said B. should then and there, in the room aforesaid, have, receive, and entertain divers male persons to the jurors unknown, with whom to commit the crime of fornication and whoredom, and did continue to let out and accommodate the said room to said B., from that day continually to the day of the taking of this inquisition, for the purpose aforesaid, in which said room the said B. then, and on divers other days and times between said day and the day of the taking of this inquisition, there did commonly, with the knowledge and consent of said H., commit whoredom and fornication, with divers persons whose names are to the said jurors unknown, to the great damage and common nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

ground we think the indictment is sustainable. In *Rex v. Scofield* (Cald. 397) it was held that the intent may make an act, innocent in itself, criminal. To apply this principle to the present case: The letting of a house is in itself an innocent act, but the defendant let his house for the purposes of prostitution, and he knew that it was used accordingly. Now keeping a bawdy-house is an offence at common law, and letting a house for such purpose must therefore be a misdemeanor.

A case has been cited in which a party was allowed, in a civil action, to recover a compensation for washing clothes for the defendant, although the plaintiff knew that the defendant was a prostitute, and that the clothes were used for the purposes of allurements. But this indictment goes further. It alleges not only that the defendant knew that his house would be put to an unlawful use, but that he let it for that very purpose. And there is a case in 1 Esp. 13 (*Girardy v. Richardson*), in which Lord Kenyon held that a party letting his house for such a purpose is not entitled to recover rent.

The *King v. Higgins* (2 East, 5) is a strong case to show that the common law will, *proprio vigore*, punish in a case like the one before us. There a man solicited a servant to steal his master's goods, and it was held a misdemeanor to solicit a person to commit a crime.

It being found here that the defendant's house was let to be used for an unlawful purpose, and his gain was found upon such use of it, the court do not think a statute necessary to make his offence indictable. The only case which looks to the contrary is the one in 2 Ld. Raym. 1197, where an indictment against a person for being a bawd was held ill, that being a spiritual offence. The reason does not hold here, as we have no spiritual court, and it does not appear that a person may not here be indicted for being a bawd.

Though we have strong doubts in this case from the arguments of Mr. Dunlap, and from the circumstance that no case has been found of an indictment for this offence in England, we have nevertheless come to the conclusion that there is no objection to this indictment on the ground of variance, and that the facts set forth constitute an indictable offence." See Wh. Cr. L. 8th ed. §§ 1449 *et seq.*

(736) *Keeping a gaming-house at common law.(q)*

That J. S., at, etc., on, etc., and at divers other times between that day and the finding of this inquisition, unlawfully did keep and maintain a certain common gaming-house; and in the said common gaming-house, for lucre and gain, on, etc., and on the said other days and times, there unlawfully and wilfully did cause and procure divers idle and evil disposed persons to frequent and come to play together at a certain unlawful game of cards called rouge et noir; and in the said common gaming-house, on, etc., and on the other days and times, there unlawfully and wilfully did permit and suffer the said idle and evil disposed persons to be and remain playing and gaming at the said unlawful game of rouge et noir, for divers large and excessive sums of money; to the great damage and common nuisance, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(737) *Second count. Gaming-room.*

That the said J. S., afterwards, to wit, on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at the parish aforesaid, in the county aforesaid, unlawfully did keep and maintain a certain common gaming-room in the house of one J. N., there situate; and in the said common gaming-room, etc. (*as in the last count, only substituting: "gaming room" for "gaming-house"*).

(738) *Keeping a common gaming-house at common law. Another form, omitting the averment in last of playing rouge et noir.(r)*

That M. M., late of, etc., being an idle and ill-disposed person,

(q) Arch. C. P. 5th Am. ed. 752. This precedent was held good in *R. v. Rogier*, 2 D. & R. 431; 1 B. & C. 272; see *Hunter v. Com.*, 2 S. & R. 298. Holroyd, J., in *R. v. Taylor* (3 B. & C. 502), intimated that it would be enough simply to charge the defendant with keeping a common gaming-house. But the better opinion, even under statutes making the keeping of common gaming-houses indictable, is that the special facts constituting the nuisance should be given. Wh. Cr. Pl. & Pr. §§ 154, 230; *U. S. v. Ringgold*, 5 Cranch, C. C. 378; *Com. v. Pray*, 13 Pick. 359; *People v. Jackson*, 3 Denio, 101; *Frederick v. Com.*, 4 B. Mon. 7; *Vanderwerker v. State*, 8 Eng. (Ark.) 700.

(r) Dickinson's Q. S. 6th ed. 425. See *R. v. Taylor*, 3 B. & C. 502. "Keeping the house" for the specified purpose is the offence; and, therefore, like keeping a bawdy-house, general evidence will support an indictment. *J. Anson v. Stewart*, 1 T. R. 754; Wh. Cr. L. 8th ed. §§ 1449 *et seq.*, § 1465.

on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, with force and arms, at, etc., a certain common gaming-house there situate, for his lucre and gain, unlawfully and injuriously did keep(s) and main-

(s) Keeping a common gaming-house, and for lucre and gain unlawfully causing and procuring divers idle and ill-disposed persons to frequent and come to play together at a game called rouge et noir, and permitting the said idle, etc., to remain playing at the said game for divers large and excessive sums of money, is indictable at common law. *R. v. Rogier*, 1 B. & C. 275; 2 D. & R. 431. S. C. ; Dickinson's Q. S. 6th ed. 425; Wh. Cr. L. 8th ed. §§ 1450, 1466. "See," says Mr. Chitty, 3 C. L. 673, "other precedents, 4 Went. 156; 6 Ib 384; 1 Bro. 237. For keeping a common raffling shop, Trem. P. C. 241. See in general Hawk. b. 1, ch. 92; Com. Dig. Justices of the Peace, B. 42; Bac. Abr. Gaming; Burns, J., Gaming; Williams, J., Gaming; 4 Bla. Com. 171-174. All common gaming-houses are nuisances, not only from the encouragement to dissipation which they afford, but also from the disturbance they occasion to the people who live near them, by the number of idle persons whom they bring together, and the quarrels they necessarily occasion (Hawk. b. 1, c. 75, s. 6)." See Wh. Cr. L. 8th ed. §§ 1461 *et seq.*

On this point, Bronson, C. J. (in *People v. Jackson*, 3 Denio, 101), says: "We have not enacted the statute (33 Hen. VIII. c. 9, s. 11) against gaming-houses. See 1 Hawk. P. C. 721, Curwood's ed. Still I have no doubt that the keeping of a common gaming-house is indictable at the common law. The *King v. Rogier*, 1 B. & C. 272; The *People v. Sergeant*, 8 Cowen, 139. It is illegal, because it draws together evil disposed persons, encourages excessive gaming, idleness, cheating, and other corrupt practices, and tends to public disorder. Nothing is more likely to happen at such places than breaches of the public peace. 1 Hawk. P. C. 693, s. 6; Roscoe's Cr. Ev. 663, ed. of 1836; 1 Russ. on Cr. 299, ed. of 1836; 3 Chit. C. L. 673, note, ed. of 1819; Arch. C. P. 600, ed. of 1840. But it is not so of a house or room for the illegal sale of lottery tickets. Men do not congregate at such places. On the contrary, they go in one at a time, and the business is transacted behind screens and in corners where there is no witness. There is enough of evil in it, but no tendency to breaches of the public peace. It is true that an unauthorized lottery is a public nuisance. 1 Rev. Sts. 665, § 26. But a place for the sale of tickets is not a lottery. Keeping an office or other place for registering tickets in an unauthorized lottery is expressly forbidden (§ 34); but there is no prohibition against keeping an office or place for the sale of tickets. I see no principle on which the first count can be supported.

"The second count charges the keeping of an ill-governed and disorderly room for the sale of tickets. The pleader has substituted the sale of tickets for such things as are usually done in bawdy-houses. This count is worse than the others."

The statute 33 Hen. VIII. c. 9, s. 11, enacts that no person shall for his gain, lucre, or living, keep any common house, alley, or place of bowling, coyting, cloysh, cayls, half-bowl, tennis, dicing-table, carding, or any unlawful game, then or thereafter to be invented, on pain of forfeiting forty shillings a day. But upon this clause it has been decided that if the guests in an inn or tavern call for a pair of dice or tables, if the house be not for gaming, lucre, or gains, but they only play for recreation and for no gain to the owner of the house, this is not within the statute, nor is such person that plays in such house that is not kept for lucre or gain, within the penalty of that law. Dalt. c. 46. By 5 Geo. IV. c. 83, s. 4, every person playing or betting in any open or public place, at or with any table or instrument of gaming, at any game or pretended game of

tain, and in the same common gaming-house, on the said, etc., and on the said other days and times there, unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to frequent and come together to game and play, and the same idle and ill-disposed persons to be and remain in the said common gaming-house, and to game and play together, on the said, etc., at, etc., and on the said other days and times there, did unlawfully and injuriously procure, permit, and suffer, by means whereof divers noises, disturbances, and breaches of the peace of the said state, then and on the said other days and times, were there occasioned and committed; to the great encouragement of idleness and dissipation, to the great damage and common nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

Like the first, only saying: "a certain common gaming-room in a certain house."

(739) *Third count. The game played being hazard.*

That the said M. M., on, etc., and on divers other days and times between that day and the said, etc., with force and arms, at, etc., aforesaid, a certain other gaming-house there situate, un-

chance, may be treated as a vagrant within the act, but playing at bowls is not within the act. 1 Cowp. c. 35; Paley, 85, 110.

A house in which a faro table is kept for the purpose of common gambling, is *per se* a nuisance, and it is not necessary to constitute it such that there should be proof of frequent affrays and disturbances committed there. *State v. Doom*, Charlton, 1; Bac. Abr. tit. Nuisance; 1 Hawk. P. C. c. 76, s. 6; *R. v. Dickson*, 10 Mod. 336; 1 Russ. on Cr. 321.

The facts which may be given in evidence against one indicted as a common gambler, are not merely those perpetrated within the county where the bill is found; foundation being first shown by proof of the *corpus delicti*, it may be proved that he kept a faro-bank or gaming-table, or had otherwise been guilty of unlawful gaming, in other counties. Such proof is admissible to prove a system of gambling on defendant's part. *Com. v. Hopkins*, 2 Dana, 420; Wh. Cr. Ev. §§ 839 *et seq.*

A single act of gaming, unaccompanied with circumstances of aggravation, is, it is said, not so much a misdemeanor as will authorize a court to require sureties for good behavior. *Estes v. State*, 2 Humph. 469.

An indictment under the South Carolina act of assembly of 1816, to prevent gaming, against a person for permitting persons to play cards at his house, being a public house, is not good, unless it state that the persons were playing at such games as were not excepted in the act, and where a conviction had taken place on such an indictment the judgment was arrested. *Reynolds v. State*, 2 N. & M'Cord, 365.

lawfully and injuriously did keep and maintain, for the gaming and playing at a certain and unlawful game with dice called hazard,^(t) and in the said last mentioned common gaming-house, on, etc., in the year aforesaid, and on the said last mentioned days and times, there unlawfully and unjustly did cause, procure, permit, and suffer divers idle and ill-disposed persons to frequent and come together, to game and play together at the said unlawful game called hazard, and the said last mentioned idle and ill-disposed persons to be and remain in the said last mentioned common gaming-house, and to game and play together at the said unlawful game called hazard, on the said, etc., and on the said last mentioned other days and times there did unlawfully and injuriously procure, permit, and suffer; and the said last mentioned persons, in the said last mentioned gaming-house there, on the said, etc., and on the said other days and times, by such last mentioned procurements, permission, and sufferance of the said M. M., did game and play together at the said unlawful game called, etc.; to the great danger, etc. (*as in the first count*).

Fourth count.

Like the third, saying: "common gaming-room," etc., as in the second.

(740) *Same, and permitting persons unknown to play at E. O.*(u)

And the jurors, etc., do further present, that M. M., being such idle, etc., and not minding, etc., on, etc., aforesaid, and on divers other days, etc., with force and arms, at, etc., aforesaid, a certain common gaming-house, there situate, for his lucre and gain, unlawfully and injuriously did keep and maintain, and in the said last mentioned gaming-house a certain common gaming-table, called an E. O. table, for the use and purpose of divers idle and ill-disposed persons whose names are to the jurors aforesaid unknown, to resort and frequent, and come together to play at a certain unlawful game called E. O., did then and there, to wit, on, etc., aforesaid, and on the said other days and times there, unlawfully and injuriously keep and maintain, and did cause and

(t) See statute 33 Hen. VIII. c. 9; 1 Hawk. c. 92; and 42 Geo. III. c. 119, respecting Little Goes. Dickinson's Q. S. 6th ed. 426.

(u) 3 Chit. C. L. 674.

procure and permit and suffer divers idle, etc., to frequent and come together, to game and play at and with the said common gaming-table, at the aforesaid game called E. O., and the said idle, etc., to be and remain at the said last mentioned common gaming-table, at the aforesaid unlawful game called E. O., then and there, to wit, on, etc., at, etc., and on the divers other days and times, at, etc., did unlawfully and injuriously procure, permit, and suffer, to the great encouragement of idleness and dissipation, to the great damage and common nuisance of all the liege subjects of our said lord the king, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

Like the third, with the same difference between the second and first, viz., the substitution of "a certain common gaming-room." Add a count merely charging the defendant with keeping a "common gaming-house," as to which see supra, 736, note, infra, 741.

(741) *Gaming-house. Form in use in New York.*

That A. B., late of, etc., yeoman, on, etc., and on divers other days and times between that day and the day of taking this inquisition, with force and arms, at, etc., a certain common gaming-house there situate, for his lucre and gain, unlawfully and injuriously did keep and maintain, and in said common gaming-house then and there unlawfully and injuriously did cause and procure divers idle and ill-disposed persons to be and remain, and the said idle and ill-disposed persons on, etc., in the year last aforesaid, and on divers other days and times between that day and the day of taking this inquisition, to game together and play at cards, dice, billiards, in the said common gaming-house aforesaid, then and there did unlawfully and injuriously procure, permit, and suffer; and the said idle and ill-disposed persons then and there, in the said common gaming-house aforesaid, on the day and year last aforesaid, and on the said other days and times, by such procurement, permission, and sufferance of the said A. B., did game together and play at cards, dice, billiards (*stating other games if any*), for money, to the great damage and common nuisance, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(742) *Against an innholder, in Massachusetts, for allowing nine-pins, etc., to be played on his premises.*(v)

That A. B., on, etc., at, etc., not being then and there licensed as an innholder, victualler, or retailer of spirituous liquors, for hire, gain, and reward, unlawfully did suffer certain persons, whose names to the jurors are unknown, to resort to a certain

(v) *Com. v. Goding*, 3 Met. 291; *Com. v. Stowell*, 9 Met. 573. Wh. Cr. L. 8th ed. §§ 1462, 1465.

In the latter case, Dewey, J., said: "The case of *Com. v. Goding*, 3 Met. 130, is a decisive authority to show that the game of bowls is an unlawful game within the provisions of the Rev. Sts. ch. 50, § 17. The next question raised is, whether it be competent to charge the defendant for two distinct offences, under that statute. If the offence charged was the keeping, in his dwelling-house, of tables for the purpose of playing at billiards, which is the offence first described in this section, the argument that this was one continuing offence, and not susceptible of a division, or properly chargeable as distinct offences, would deserve consideration. But the case before us does not present that question.

"The statute provides that, 'if any person not licensed as an innholder, victualler, or retailer of spirituous liquors, shall keep, or suffer to be kept, in any house, building, yard, garden, or dependency thereof, by him actually used or occupied, any tables for the purpose of playing at billiards, for hire, gain, or reward, or shall for hire, gain, or reward, suffer any person to resort to the same for the purpose of playing at billiards or any other unlawful game, every person so offending shall, for every such offence, forfeit,' etc.

"It is this latter offence, and not the act of keeping a house or place for playing at billiards, etc., which is the subject of the present indictment. The offence here charged is not a continuing offence. It consists in permitting persons, for hire and reward, to resort to a building used by the defendant, for the purpose, on their part, of playing at bowls. This offence may be repeated from day to day, and in connection with different individuals, and of course may be the subject of distinct indictments, or distinct counts in the same indictment.

"Such being the nature of the offence, it is properly charged on a single day certain, and not on divers days and times.

"It is then objected to the sufficiency of this indictment, that it does not allege that the persons who resorted to the building used by the defendant, actually played there at the game of bowls. But the statute offence is complete, if they were permitted by the defendant to resort to a building by him used for the purpose of playing at bowls. The indictment is, we think, sufficient in this respect.

"It is further objected to the indictment, that it does not allege that any persons resorted to the building of the defendant for the purpose of playing at bowls. This objection arises upon the collocation of the words 'for the purpose of playing at bowls.' These words, alleging the purpose, etc., are supposed by the counsel for the defendant to be solely applicable to the building, and introduced to define the character of the house, and not the purpose for which the visitors resorted to the house. This, as it seems to us, is an erroneous reading of the indictment. The allegation of 'the purpose of playing at bowls,' seems more distinctly to be applied to the persons who resorted to the house.

"The allegation is, that the building was actually used and occupied by the defendant, and that while it was thus occupied and used, he, for hire and reward, permitted certain persons to resort thereto for the purpose of playing at bowls. The language is reasonably certain, and brings the case within the statute."

building there situate, and by said A. B. then and there actually used and occupied for the purpose of playing at bowls and nine-pins, the same being then and there an unlawful game, against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(743) *Against same for keeping gaming cocks, under Rev. Sts. ch. 47, § 9.(w)*

That T., etc., at, etc., on, etc., did have in his the said T.'s house, in said W., certain game-cocks, the said game-cocks being then and there implements of gaming, the said T. being then and there duly licensed, according to law, as an innholder, and the said house being the same in which the said T. was so licensed, according to law, as an innholder as aforesaid, and he the said T. being then and there in said house, in the occupation of an innholder as aforesaid, under said license, and he the said T. did then and there suffer certain persons then and there resorting to said house, to wit, A. B., etc., and C. D., etc., then and there to use and exercise, within his the said T.'s said house, the game of cock-fighting, the same being an unlawful game, to wit, with the game-cocks aforesaid; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(744) *Against tavern-keeper for permitting unlawful gaming, in Pennsylvania.(x)*

That A. B., etc., on, etc., and at divers other days and times between that day and the day of the taking of this inquisition, with force and arms, etc., at, etc., then and at the said other days and times being a tavern-keeper and a retailer of spirituous liquors within the said county, unlawfully did permit and allow divers games of address and hazard at cards to be practised and played at for money within his house in the said county; and then and at the said other days and times, in his said house, did permit divers persons, to the inquest aforesaid unknown, to be and remain playing, betting, and gaming for money at cards and other unlawful games; to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(w) Com. v. Tilton, 8 Met. 234. Wh. Cr. L. 8th ed. §§ 1465, 1465a.

(x) This indictment originally appeared in Reed's Digest

(745) *Against a person in same, for keeping a gambling device called sweat-cloth.(y)*

That L. W., late of, etc., yeoman, on, etc., at, etc., unlawfully did publicly and privately set up, erect, make, exercise, keep open, show, and expose to be played at, drawn at, and thrown at by dice, numbers, and figures, a certain play and device called sweat-cloth, and then and there unlawfully did cause and procure to be set up, erected, made, exercised, kept open, showed, and exposed to be played at, drawn at, and thrown at by dice, numbers, and figures, a certain play and device called sweat-cloth, contrary, etc., to the common nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(746) *Second count. Common gaming-house.*

That the said L. W., on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed, and disorderly gaming-house there situate, and then in his said gaming-house did cause, entice, and procure divers disorderly and idle persons to come and resort, and then and there in his said house, the same disorderly and idle persons to be and remain, drinking, tippling, gaming, and playing at unlawful games with dice, numbers, and figures, for money, liquor, and other valuable things, unlawfully did procure, permit, and suffer, to the common nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(747) *Gambling under Pennsylvania act of 1847. First count, keeping a room for gambling.(z)*

That T. E. J. K., late of, etc., yeoman, and R. B., late of, etc., yeoman, on, etc., at, etc., unlawfully did keep a room to be used and occupied for gambling, and did knowingly permit the same to be used and occupied for gambling, to the great scandal of

(y) Drawn in 1808, by Thomas Sergeant, Esq., then deputy attorney-general, and afterwards judge of the supreme court of Pennsylvania.

(z) These counts were sustained in *Com. v. Kerrison*, Philadelphia, Sept. T. 1847.

public morals, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(748) *Second count. Exhibiting gambling apparatus.*

That the said T. E. J. K. and the said R. B., on the day and year aforesaid, at the county and within the jurisdiction aforesaid, unlawfully did keep and exhibit a certain gaming-table, and devices and apparatus to win money thereat and therewith, contrary to the form of the act of the general assembly in such case made and provided, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(749) *Third count. Aiding persons unknown in keeping a gambling table.*

That the said T. E. J. K. and R. B., on the day and year aforesaid, at the county and within the jurisdiction aforesaid, unlawfully did aid and assist certain persons, whose names are to the inquest aforesaid as yet unknown, to keep a certain gaming-table, and device and apparatus thereto belonging, to win and gain money thereat and therewith, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(750) *Fourth count. Persuading J. S. to visit a gambling room.*

That the said T. E. J. K. and R. B., on the day and year aforesaid, at the county and within the jurisdiction aforesaid, did unlawfully persuade and prevail on one J. W. S., by means of an invitation then and there given by the said T. E. J. K. and R. B., to the said J., to visit a certain room then and there kept for the use of gambling, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(751) *Against a tavern-keeper for holding near his house a horse-race, under the Pennsylvania statute.(a)*

That S. B., late of, etc., yeoman, on, etc., at, etc., the said S. then and there being the keeper of a public house, a certain horse-race, on, etc., had, holden, and run near the house of the said S. B., at which said horse-race divers sums of money and

(a) This form was prepared by Jared Ingersoll, Esq., the then attorney-general of Pennsylvania.

other valuable things were betted, staked, and striven for, and were lost and won, did incite, promote, and encourage, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, a certain horse-race was had, holden, and run near the house of the said S. B., at which said horse-race divers sums of money and other valuable things were betted, staked, and striven for, and were lost and won, and that certain evil and ill-disposed persons being then and thus assembled together and attending at and upon the said horse-race, the said S. B., on the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, etc., to the said evil and ill-disposed persons so assembled together and at the said horse-race as aforesaid then and there had, holden, and run, divers quantities of wines, spirituous liquors, beer, cider, and other strong drink did furnish, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(752) *For a masquerade, under Pennsylvania statute of 15th February, 1808.*(b)

The grand inquest of the commonwealth of Pennsylvania, inquiring for the of upon their oaths and affirmations respectively do present, that late of, etc., on, etc., at, etc., did set on foot, promote, and encourage a masquerade within the aforesaid, to the great danger, etc., to the common nuisance, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(754) *Gaming in Alabama. First count, playing at cards.*

That A. B., late of, etc., on, etc., in the county aforesaid, did play at a game with cards in a tavern there situate, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That the said A. B., late of, etc., on the day and year aforesaid, in the county aforesaid, did play at a game with cards in a house where spirituous liquors were then and there retailed, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That the said A. B., late of said county, on the day and year

aforesaid, in the county aforesaid, did play at a game with cards in a public place, against, etc. (*Conclude as in book 1, chapter 3.*)

(755) *Keeping a gaming-table in Alabama.(c)*

That R. W. W., late of, etc., on, etc., in the county aforesaid, did keep and exhibit a certain gaming-table, called a faro-bank, played with cards, and kept for gaming, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

PROFANATION OF LORD'S DAY.

(756) *Nuisance in an open profanation of the Lord's day, by keeping shop.(d)*

That A. B., late of, etc., butcher, on, etc., and continually afterwards until the day of taking this inquisition, at, etc., was

(c) *State v. Whitworth*, 8 Port. 435.

(d) *Dickinson's Q. S.* 6th ed. 389. See *Wh. Cr. L.* 8th ed. § 1431a.

Particular instances of profanation of the Lord's day, or Sunday, are by several statutes made punishable before magistrates; but it is also said to be indictable at common law (2 East, P. C. c. 1, s. 3); and, as it seems, as a breach of public decency. Mr. East goes on to mention the above precedent, citing an early edition of the *Crown Circuit Comp.* 155, and 1 Hawk. c. 6, s. 1, 2, 3. "At sessions," says Hawkins (ed. 1787, book 1, c. 6), "it is usual to indict for the nuisance in keeping open shop," and cites *Crown Circuit Comp.* 372. The eighth and latter editions of that work, however, omit the above precedent. A butcher might kill or sell victuals on Sunday before 3 C. I. c. 1; accordingly, an indictment against a butcher for exercising his trade on a Sunday was held bad on demurrer, for not concluding "against the form of the statute." *R. v. Brotherton*, Stra. 702. *Quere*, for the act makes it only the subject of a penalty recoverable before a justice. See also 4 Bl. C. 63; 1 Taunt. 134; *Dickinson's Q. S. ut supra*. And that the offence of keeping shop on a Sunday is not indictable at common law unless the public rest be disturbed, and public scandal caused, see *Wh. Cr. L.* 8th ed. § 1431.

In Middlesex county, England, the practice has been to issue precepts each term from the crown office, directed to the constables in the different districts, to make returns to the grand jury, by way of presentment of all nuisances and profaners of the Lord's day, etc., in order that they may be proceeded against according to law. These returns, when made, are considered as presentments, and may be prosecuted as such, or as indictments. 1 Chit. C. L. 4th ed. 310. In practice, however, after appearance entered for defendant, the proceeding is in general abandoned. 7 & 8 Geo. IV. c. 38, does not extend to prevent presentments (at least in Middlesex) by constables against persons, for that they, "being common Sabbath-breakers and profaners of the Lord's day, commonly called Sunday, did on certain Sabbath days and hours, during the celebration of divine service, keep open shop, and therein openly sell divers goods." This subject having been brought before the Court of King's Bench, in *Trin. T.* 1837, by the grand jury of Middlesex, Mr. Justice Littleton, in his charge to them on 11th November, 1837, stated that the presentments of nuisances, etc., by the constables to the grand juries, were of the most remote antiquity, and must be

and yet is a common Sabbath-breaker and profaner of the Lord's day, commonly called Sunday ;(e) and that the said A. B., on, etc., being the Lord's day, and on divers other days and times, being the Lord's days, during the time aforesaid, at, etc., in a certain place there, called, etc., did keep a common, public, and open shop, and in the same shop did then, and on the said other days and times, being the Lord's days, there openly and publicly sell and expose to sale flesh meat to divers persons to the jurors aforesaid as yet unknown ;(f) to the common nuisance,(g) etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(757) *Keeping shop open, or trafficking on the Sabbath, on Charleston Neck.*(h)

That A. B., being the owner and occupier of a grocery store and retail shop, situate in the parish of St. Philip, in the district of Charleston, and state aforesaid, and within the limits of Charleston Neck, in which said store and shop spirituous liquors were and are usually vended, on, etc., being the Sabbath day, with force and arms, at, etc., unlawfully did (*stating offence*), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

considered deliberately by the latter, who must proceed to present such offences of profanation of the Sabbath as should be returned to them, and thus afford the opportunity of proceeding on such presentments, to any person who might take them up. He also declared that Sunday trading, if carried on to any extent which creates a nuisance (see 1 Taunt. 134), or obstruction, was indictable at common law; but that a mere act of selling on the Lord's day was not now more indictable than it had been for the last seven hundred years. Dickinson's Q. S. 6th ed. 389.

The constitutionality of laws of this class was affirmed in Pennsylvania in *Com. v. Specht*, 8 Barr, 312. To same effect see *State v. Gurney*, 37 Me. 149; *State v. Barker*, 18 Vt. 195; *Com. v. Harrison*, 11 Gray, 308; *Schlit v. State*, 31 Ind. 346; *Foltz v. State*, 33 Ind. 215; *State v. Anderson*, 30 Ark. 131; *State v. Ambs*, 20 Mo. 214.

(e) As to the averment of Sunday, see *supra*, vol. i. p. 14.

(f) If they are known their names must be stated. Dickinson's Q. S. 6th ed. 390.

(g) This allegation was omitted in *R. v. Brotherton*, Stra. 702, as well as "against the form of the statute." Such an act done in a corner might perhaps not be indictable at common law. *Drury v. Desfontaines*, 1 Taunt. 134; Dickinson's Q. S. 6th ed. 390. Hence both "common nuisance" and "against the form of the statute," etc., should be included.

(h) Taken from the printed form in use in Charleston.

(758) *Doing business on Sunday, against the Massachusetts statute.*(i)

That A. B., late of, etc., on, etc., that day being Lord's day, and between the hour of twelve of the clock at night on the Saturday night preceding said Lord's day, and the time of the sun's setting on said Lord's day, at, etc., did keep open his shop, there situate, for a long time, to wit, for the space of one hour, for the purpose of doing labor, business, and work therein, not being works of necessity or charity, namely, selling goods and merchandise therein on said Lord's day, as aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That A. B., of, etc., on, etc., that day being Lord's day, and between the midnight preceding and the midnight succeeding said day, at Boston aforesaid, he then and there being a person keeping a certain house, shop, and place of public entertainment and refreshment, there situate, did then and there suffer certain persons whose names to said jurors are not known, to the number of to abide and remain in his said house, shop, and place of business, drinking and spending their time idly, said persons not being travellers, strangers, or lodgers in his house and shop and place of business aforesaid, and did then and there, and between the midnight preceding and the midnight succeeding said Lord's day, entertain said persons to the said number of in his said house, shop, and place of business, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That A. B., of, etc., on, etc., between the midnight preceding and the sunsetting of said day, that day being the Lord's day, did, at Boston aforesaid, do certain work, labor, and business, not being works of necessity and charity, to wit, did then and there work, labor, and do business, work, and labor in against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That A. B., of, etc., on, etc., at, etc., he then and there not being licensed as an innholder, tavern-keeper, common victualler, or retailer of wine, rum, brandy, or other spirituous liquor, did

(i) Taken from the printed form in use in Boston.

sell to a person whose name is as yet unknown to said jurors, a certain quantity of intoxicating liquor, to wit, one-half of a gill of intoxicating liquor, the same day of being Sunday, and the time of said sale of said intoxicating liquor being between the hour of twelve of the clock on the Saturday night preceding said Sunday, and the time of the sunsetting on said Sunday, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

UNWHOLESOME MEAT, ETC.

(759) *For selling unwholesome meat.*(j) *Rev. Sts. of Mass. ch. 171, § 11.*

That A. B., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., knowingly,(k) wilfully, and maliciously did sell to one C. D. a certain quantity of diseased, corrupted, and unwholesome provisions, to wit, ten pounds of diseased, corrupted, and unwholesome beef,(l) to be then and there used and eaten by the said C. D., for meat.(m) the said A. B. not then and there making fully known to the said C. D. that the said beef was then and there diseased, corrupted, and unwholesome, and the said A. B. then and there well knowing the said beef to be diseased, corrupted, and unwholesome; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(760) *For adulterating bread for the purpose of sale.*(n) *Rev. Sts. of Mass. ch. 31, § 12.*

That A. B., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., unlawfully and fraudulently did adulterate a certain substance intended for food, to wit, fifty loaves of bread, with a certain substance inju-

(j) Tr. & H. Prec. 399.

(k) This is necessary. Wh. Cr. L. 8th ed. § 1434.

(l) The kind of food must be specified. *Goodrich v. People*, 3 Park. C. R. 622; 19 N. Y. 574.

(m) This allegation said in New York to be unnecessary. *Goodrich v. People*, 3 Parker, C. R. 622; 19 N. Y. 574; Wh. Cr. L. 8th ed. §§ 1434-5; see *People v. Parker*, 38 N. Y. 85. But an allegation to this effect, *e. g.*, as "food," or "for human use," is proper to complete the description of the offence. *R. v. Jarvis*, 3 F. & F. 108.

(n) Tr. & H. Prec. 399.

rious to health, to wit, with a certain substance called alum, with the intent, and for the purpose, then and there, of selling the same; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(760a) *Selling adulterated milk under Mass. Rev. Stat. 1864, ch. 122, § 4.(o)*

That A. B., etc., did unlawfully keep, offer for sale, and sell to one B. D., for the sum of forty cents, a large quantity, that is to say, eight quarts, of adulterated milk, to which a large quantity, that is to say, four quarts, of water had been added (he the said A. B. well knowing said milk so sold to be adulterated, and well knowing that said large quantity of water had been added to said milk).(p)

(761) *Selling adulterated medicine.(q) Mass. stat. 1853, ch. 394, § 1.*

That A. B., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., knowingly and unlawfully did sell to one C. D. a certain quantity of a fraudulently adulterated drug, to wit, one pound of opium, the said A. B. then and there well knowing the same to be adulterated; against, etc., and contrary, etc.

(762) *For selling a diseased cow in a public market (r)*

That J. L. P., late of London, laborer, on the first day of April, in the year of our Lord at London, that is to say, at the parish of Saint Sepulchre, in the ward of Farringdon Without, in London aforesaid, was possessed of a certain cow, which said cow was then and there infected with a contagious, infectious, and dangerous disease; and that the said J. L. P., well knowing the premises, afterwards, and whilst the said cow of the said J. L. P. was so infected as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wil-

(o) This form was approved in *Com. v. Farren*, 9 Allen (Mass.), 489.

(p) The *scienter* under this particular statute need not be sustained by proof, and may be discharged as surplusage. *Ib.*

(q) *Tr. & H. Prec.* 400.

(r) 4 Cox, C. C. Appendix, p. xiv.

fully, maliciously, and injuriously did drive and bring, and cause and procure to be driven and brought, the said cow, so infected as aforesaid, through and along divers public streets and ways where certain other cattle of the citizens of said were then passing, unto and into a certain market called Smithfield market, situate and being in the city of London aforesaid, during the period that the citizens of said were then and there holding the said market, which was then and there public and open to all the citizens of said for the purpose of buying and selling their cattle therein, and that the said J. L. P., well knowing the premises as aforesaid, kept and continued the said cow, so infected as aforesaid, in the said market during the period of the holding the same as aforesaid, for a long space of time, to wit, for the space of twelve hours then next following; and in which said market, during the whole of the said last mentioned period, there were and of right ought to have been divers other cows and cattle of certain citizens of said then and there passing and being, by means of which said several premises, the said last mentioned cows and cattle, so passing and being along and in the said market, became and were liable to be infected by the contagious, infectious, and dangerous disease with which the said cow of the said J. L. P. was infected as aforesaid, to the damage, etc., to the evil example, etc., and against the peace, etc.

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public market, called Smithfield market, where butchers and other citizens of said assemble and meet together, for the purpose of buying cattle, to be subsequently slaughtered by them for the food of certain others of the citizens of said and that afterwards, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, then and there infected with a contagious, infectious, and dangerous disease; and that the said J. L. P., well knowing the

said last mentioned premises, afterwards, and whilst the said last mentioned cow of the said J. L. P. was so infected as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously did drive and bring, and cause and procure to be driven and brought, the said last mentioned cow, so infected as aforesaid, unto and into the said last mentioned market, with the intention of selling and disposing of the same to the said butchers and others, and that the same might be bought and subsequently slaughtered for the food of certain citizens of said ; and that the said J. L. P. did then and there unlawfully, wickedly, wilfully, maliciously, and injuriously, and for his own lucre and gain, expose to sale, and cause and procure to be exposed to sale, the said last mentioned cow, so infected as aforesaid, in the said public market, with the intention and for the purpose aforesaid, the said J. L. P. then and there well knowing that the said cow, so brought into the said public market and exposed to sale as aforesaid, would, if slaughtered, be unfit and unwholesome for food, and greatly prejudicial to the health of the citizens of said eating and consuming the same; to the damage, etc., to the evil example, etc., and against the peace, etc.

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that heretofore, to wit, on the day and year aforesaid, at the parish and in the ward aforesaid, in London aforesaid, there was, and from time immemorial hath been, and still is, a certain public and open market, called Smithfield market, where butchers and other citizens of said have been used and accustomed to assemble and meet together, and where divers and very many butchers and other citizens of said

were then assembled and met together, for the purpose of buying cattle, to be subsequently slaughtered by them for human food, to wit, for the food of certain others of the citizens of said and that afterwards, to wit, on the day and year aforesaid, in the said public and open market, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, which was then

zens of said and that afterwards, to wit, on the day and year aforesaid, in the said public and open market, at the parish and in the ward aforesaid, in London aforesaid, the said J. L. P. was possessed of one other cow, which was then and there infected with a loathsome, deadly, and dangerous disease, and which said last mentioned cow the said J. L. P. then and there well knew would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of any of the citizens of said who might eat and consume the same; and that the said J. L. P., well knowing the said last mentioned premises, afterwards, and whilst the said last mentioned cow of the said J. L. P. was so infected with the said disease as aforesaid, on the day and year aforesaid, with force and arms, at the parish and in the ward aforesaid, in London aforesaid, unlawfully, wickedly, wilfully, maliciously, and injuriously, and for his own lucre and gain, did expose to sale in the said public and open market, and did then and there sell the last mentioned cow, which was so then and there infected with the disease as aforesaid, to a certain butcher, to wit, one G. G., in order that the same might be subsequently slaughtered for human food, to wit, for the food of certain citizens of said ; the said J. L. P. then and there well knowing that the said last mentioned cow, so then and there sold as aforesaid, would, if slaughtered, be unfit and unwholesome for human food, and greatly prejudicial to the health of the citizens of said who might eat and consume the same; to the damage, etc., to the evil example, etc., and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

(763) *Offering putrid meat for sale.*(s)

That C. C., late of, etc., butcher, on, etc., unlawfully, knowingly, and mischievously, at, etc., in the public market there situate, did expose and offer for sale, as good, sound, and wholesome meat and provisions, to divers liege citizens of the commonwealth of Pennsylvania, fifty pounds' weight of beef and upwards, the same beef then and there being infected, putrid,

(s) Drawn by Wm. Bradford, Esq., when attorney-general of Pennsylvania. See, as to offence generally, Wh. Cr. L. 8th ed. §§ 1434-5.

corrupted, and unsound and unwholesome meat and provisions, he, the said C., then and there well knowing the said beef to be as aforesaid putrid, infected, corrupted, unsound, and unwholesome, to the great damage of the health, and to the nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(764) *Another form for the same.(t)*

That S. S., Jr., late of, etc., farmer, on, etc., at, etc., did then and there unlawfully, falsely, maliciously, mischievously, and

(t) *State v. Smith*, 3 Hawks, 378.

Taylor, C. J.—“The first exception, taken both as a ground for a new trial, and in arrest of judgment, that there is no charge of the defendant's being a trader in beef, cannot be sustained; for the fact charged in the indictment and with the circumstances accompanying it, is indictable by whomsoever committed. It is not necessary to state in such indictment that the defendant acted in violation of any duty imposed on him by his peculiar condition; for it is a misdemeanor at common law knowingly to give any person injurious food to eat, whether the defendant be excited by malice or a desire of gain. The charge in Treeve's case was, for wilfully, deceitfully, and maliciously supplying prisoners of war with unwholesome food, not fit to be eaten by man. It was laid as an offence at common law; and an exception was taken in arrest of judgment, that it was not indictable, as it did not appear that what was done was in breach of any contract with the public, or of any moral or civil duty. The defendant was, in fact, a contractor with the public for supplying the prisoners with provisions, but that was not stated in the indictment, nor was it held necessary to state it; and the conviction was supported upon the broad ground, that the giving of unwholesome victuals, not fit for man to eat, whether from motives of gain, from malice, or deceit, was clearly an indictable offence. 2 East, P. C. 821.

“There are several precedents of indictments for the same offence, variously modified, stated in 2 Chit. C. L. 556, on which convictions have been had, upon undoubted principles of law. It is true, that a very ancient statute was passed, further to aggravate the punishment for selling unwholesome provisions, but as I have met with no prosecutions upon it, the common law may be supposed to have been weakened by the legislature's making declarations against offences which were criminal by the common law, when properly understood. Of this, several remarkable instances are stated in Barrington on the Statutes, 313. It seems, upon the whole, that the public health, whether affected through the medium of unwholesome food, or poisoning the atmosphere, or introducing infectious diseases, is anxiously guarded by the common law. There ought to be judgment for the state.”

Hall, J.—“I concur in opinion, that the act charged in the indictment is an indictable offence. In 4 Bl. 162, it is said that it is an offence against public health to sell unwholesome provisions. From this it might be inferred, that unless the public were concerned in the act, it was not a public offence, as in the case of *The King v. Baldock*, for supplying the prisoners with wholesome food, he being a public contractor for that purpose (2 Chit. C. L. 556), and the case of *The King v. Treeve*, who was indicted for the same offence. 2 East, C. L. 821. But it is laid down by both these writers, that the person charged need not be a public contractor; that it is a misdemeanor at common law to give any person unwholesome food, not fit for man to eat, *lucri causa*, or from malice or deceit, apart from other considerations which entered deeply into the demerits of Baldock and Treeve. See also 6 East, 133, 141; 2 East, C. L. 823; 2 Ld. Raym. 1179;

deceitfully sell and dispose of to one D. C. and others, certain unwholesome and poisonous beef, and did then and there receive pay for the same (he the said S. S. then and there well knowing the said beef to be unwholesome and poisonous),(u) to the great injury of the said D. C. and his family, to the great nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

SCANDALOUS EXHIBITIONS, INDECENT EXPOSURE, ETC.

(765) *Exhibiting scandalous and libellous effigies, and thereby collecting a crowd, etc. First count.(v)*

That the said R. C., afterwards, to wit, on, etc., and on divers other days and times, as well on the Lord's day, commonly called Sunday, as on other days, between the said, etc., and the day of taking this inquisition, and for divers long spaces of time, to wit, for the space of ten hours in each of the several days last aforesaid, at, etc., at the windows of a certain messuage, shop, and premises, of and belonging to the said R. C., there situate and being in and near to a certain common and public highway there, called Fleet street, and to the dwelling-houses and residences of divers the liege subjects of our said lord the king, there inhabiting and residing, unlawfully did publicly exhibit and expose, and did cause to be publicly exhibited and exposed, divers, to wit, three, scandalous and libellous effigies and figures, that is to say, one effigy and figure intended to represent and representing the devil with a pitchfork, and one other effigy and figure intended to represent and representing a bishop of the established church of the said united kingdom; the said two last mentioned effigies and figures being placed together, and one arm of the said effigy and figure representing the bishop being placed within one arm of the said effigy and figure representing the devil; and underneath the said two last mentioned effigies

3 Ld. Raym. 487. The offence is one that common prudence cannot guard against, and, what is most important, the consequences cannot be calculated. I think judgment should be given for the state."

Henderson, J., concurred.

(u) This is not in the original form, but should be added as necessary at common law.

(v) R. v. Carlisle, 6 C. & P. 636; Wh. Cr. L. 8th ed. §§ 1413, 1464.

The defendant was convicted and sentenced before Mr. Justice Park, Mr. Baron Bolland, and Sir John Cross, knight.

and figures was a certain inscription and paper writing, in large letters and characters, as follows, that is to say, "Spiritual Brokers;" and one other effigy and figure representing, and intending to represent, the person of a man in the ordinary dress of a tradesman, and underneath the said last mentioned effigy and figure was a certain other inscription and paper writing, in large letters and characters, as follows, that is to say, "Temporal Brokers;" and between the said two effigies and figures in this count first mentioned, and the said effigy and figure in this count last mentioned and near to all the effigies and figures in this count aforesaid, was a certain other inscription and paper writing, in large letters and characters, as follows, that is to say, "Props of the Church;" and also divers scandalous and libellous placards and paper writings, one of which said placards and paper writings was as follows, that is to say, "No Church Rates;" one other of which said placards and paper writings was as follows, that is to say, "Church Robberies;" one other of the said placards and paper writings was entitled as follows, that is to say, "Battle of Church Rates;" and one other of said placards and paper writings was entitled as follows, that is to say, "Another Seizure;" near to the said common and public highway called Fleet street, and to the dwelling-houses and residences aforesaid, and within view of persons passing and repassing in and along the said highway, with intent to attract the notice and attention of persons passing and repassing in and along the same highway to the effigies and figures, inscriptions, placards, and paper writings, in this count aforesaid, and thereby on the several days in that behalf aforesaid, and as well on the Lord's day, commonly called Sunday, as on the said other days, at the parish and ward aforesaid in London aforesaid, and within the jurisdiction of the said court, he, the said R. C., unlawfully did cause and procure and occasion divers persons, that is to say, forty persons, as well men as women and children, and idle, dissolute, and disorderly people, wrongfully and injuriously to assemble, stand, be, and remain in the highway aforesaid, and near to the dwelling-houses and residences aforesaid, for divers long spaces of time, to wit, for the space of ten hours in each of the several days in that behalf aforesaid, looking at the said last mentioned effigies and figures, and reading the said last mentioned placards and paper writ-

ings, so by him the said R. C. exhibited and exposed, in manner and with intent aforesaid; by means of which said several premises, in this count aforesaid, the common and public highway aforesaid, on the several days and times in that behalf aforesaid, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, was greatly obstructed and straitened, so that the liege subjects of our said lord the king, during the times in this count aforesaid, could not go, return, pass, and repass, in and along the said common and public highway, and to and from the said dwelling-houses and residences situate and there being near to the said messuage, shop, and premises of the said R. C., so freely and conveniently as they had been used and accustomed to do, and of right ought to have done, and still of right ought to do, to the great damage and common nuisance of all the liege subjects of our said lord the king, in and along the said common and public highway called Fleet street, and to and from the dwelling-houses and residences aforesaid, going, returning, passing, and repassing, and near to the aforesaid messuage, shop, and premises of the said R. C., dwelling and residing, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said R. C. afterwards, to wit, on, etc., and on the said several other days in that behalf hereinbefore mentioned, with force and arms, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, unlawfully and injuriously did put, place, and exhibit and expose, and cause and procure to be put, placed, exhibited, and exposed, divers, to wit, three, other effigies and figures, that is to say, one effigy and figure intended to represent and representing the devil with a pitchfork, one other effigy and figure intending to represent and representing a bishop of the established church of the said united kingdom, and one other effigy and figure, at the windows and on the outside of a certain messuage and shop there situate and being, adjacent to a certain common and public highway there called Fleet street, and to the dwelling-houses and residences of divers liege subjects of our said lord the king, situate there, and did unlawfully and injuriously keep and con-

tinue, and cause to be kept and continued, the same effigies and figures, so there put, placed, exhibited, and exposed, as last aforesaid, for divers long spaces of time, to wit, for the space of ten hours in each of the several days in that behalf aforesaid, he the said R. C., at the several times he so put, placed, and exhibited and exposed the said effigies and figures in this count aforesaid, and continued the same so put, placed, exhibited, and exposed as aforesaid, well knowing that the said highway would thereby be obstructed in the manner in this count hereinafter mentioned; and that the said R. C., on the several days in that behalf aforesaid, and for divers long spaces of time, to wit, for the space of ten hours in each of the said several days, and as well on the Lord's day, commonly called Sunday, as on the said other days, at the parish and ward aforesaid, in London aforesaid, and within the jurisdiction of the said court, by means of the putting, placing, exhibiting, and exposing the said last mentioned effigies and figures, and keeping and continuing the same so put, placed, exhibited, and exposed at the windows, and the outside of the said messuage and shop, as in this count aforesaid, wilfully, unlawfully, and injuriously did cause and procure and occasion divers persons, as well men as women and children, and idle, dissolute, and disorderly people, that is to say, forty persons, to assemble, stand, and be and remain in the said last mentioned highway, whereby the same highway, on the several days and times in that behalf aforesaid, and as well on the Lord's days, commonly called Sundays, as on other days, was greatly obstructed and straitened, so that the liege subjects of our said lord the king, during the said times, could not go, return, pass, and repass, in and along the same highway, so freely and conveniently as they had been used and accustomed to do, and of right ought to have done, and still of right ought to do, to the great damage and common nuisance of all the liege subjects of our said lord the king, in and along the same highway going, returning, passing, and repassing, and there inhabiting and residing, and against, etc. (*Conclude as in book 1, chapter 3.*)

(765a) *Exhibiting indecent shows.*

The jurors for, etc., upon their oath present, that J. S. and G. H., being scandalous and evil disposed persons, and devising,

contriving, and intending the morals as well of youth as of divers other liege objects of our said lady the queen to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, etc., at, etc., unlawfully, wickedly, and scandalously did keep and maintain a certain booth, tent, and shed for the purpose of exhibiting and showing to the sight and view of any person or persons willing and desirous of seeing the same, and paying for their admission into the said booth, tent, and shed, divers lewd, wicked, scandalous, infamous, bawdy, and obscene performances, representations, practices, and figures, and in the said booth, tent, and shed, on, etc., at the parish aforesaid, in the county aforesaid, unlawfully, wickedly, and scandalously for lucre and gain did exhibit and show the said performances, practices, representations, and figures, and cause and permit the same to be exhibited and shown to the sight and view of divers and very many liege subjects of our said lady the queen, to the manifest corruption of the morals as well of youth as of other liege subjects of our said lady the queen, in contempt of our said lady the queen and her laws, to the evil example of all others in like case offending, and against the peace, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

After commencing with a similar inducement as in the first count, proceeded: On, etc., at, etc., in a certain booth, tent, and shed there situate, did unlawfully, wickedly, and scandalously exhibit, show, and cause to be exhibited and shown for lucre and gain, to and in the view of divers and very many liege subjects of our lady the queen, divers lewd, wicked, scandalous, bawdy, and obscene performances, representations, practices, and figures (concluding as the first count).

Third count.

After commencing as in the first count, proceeded: On, etc., in a certain public place, to wit, Epsom Downs, situate, etc., unlawfully, wickedly, and scandalously did exhibit and show and cause and permit to be exhibited and shown, for lucre and gain, to the sight and view of divers liege subjects of our lady the queen, in the said public place as aforesaid then being, di-

vers indecent, lewd, filthy, bawdy, and obscene representations, practices, and performances. (Here followed a more specific description of the indecency, and then the count concluded as the first count.)

Fourth count.

After commencing as in the first count, proceeded: On, etc., in the presence and hearing of divers liege subjects of our said lady the queen there assembled together, to wit, on Epsom Downs, in, etc., unlawfully, wickedly, and scandalously did publish, utter, pronounce, and declare, and cause and procure to be published, uttered, pronounced, and declared, the wicked, obscene, filthy, and bawdy words and matter following, that is to say: (The words uttered were then set out, and the count concluded as in the first count.)

Fifth, Sixth, and Seventh counts

Were similar to the first count, only alleging the offence to have been committed on the 26th day of May, 1875.

Eighth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S. and G. H., on, etc., and on divers other days and times between that day and the day of taking this inquisition, at, etc., near unto the queen's common highways, unlawfully did keep and maintain in a certain public place, to wit, on, etc., a certain booth, tent, and shed for the purpose of exhibiting and showing indecent, lewd, wicked, and obscene performances, exhibitions, representations, and figures to the sight and view of any person or persons willing and desirous of seeing the same, and of paying for their admission, and that the said J. S. and G. H., on the day and year aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the parish aforesaid, in the county aforesaid, unlawfully did exhibit and show and cause to be exhibited and shown in the said booth, tent, and shed, there situate as aforesaid, to the sight and view of divers and very many liege subjects of our lady the queen, divers indecent, lewd, wicked, and obscene performances, exhibitions, representa-

tions, and figures, to the great damage and common nuisance of all the liege subjects of our said lady the queen there inhabiting, being, residing, and passing, to the evil example of all others in the like case offending, and against the peace, etc.(w)

(766) *Keeping a house in which men and women exhibit themselves naked, etc., as "model artists."*(x)

That E. F., late of, etc., on, etc., and on divers other days and times between that day and the day of the taking of this inquisition, at, etc., did keep and maintain, and yet doth keep and maintain, a certain common, ill-governed, and disorderly house, and in his said house, for his own lucre and gain, certain persons, as well men as women, of evil name and fame, and of dishonest conversation, did permit to frequent and come together, and the said men and women then and on the said other days and times, there unlawfully and wilfully did cause and procure in his said house, publicly to expose and exhibit themselves, for the lucre and gain of him the said E. F., to divers persons in his said house assembled, in various scandalous, lewd, lascivious, obscene, and indecent groupings, attitudes, postures, and positions, to the manifest corruption of the morals as well of youth as of other good and worthy citizens of the state of New York, in open violation of decency and good order, to the great damage and common nuisance, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said E. F., afterwards, to wit, etc., and on divers other days and times between that day and the day of the taking of this inquisition, at, etc., unlawfully did publicly exhibit and show, and cause and procure to be publicly exhibited and shown for money, certain persons, men as well as women, whose names are to the jurors aforesaid unknown, in various impudent, lascivious, lewd, wicked, scandalous, and obscene groupings,

(w) Sustained in *R. v. Saunders et al.*, 13 Cox C. C. 116.

(x) This form was drawn in New York, in March, 1848, for the purpose of reaching the "Model Artists," an assemblage of men and women who were exhibited in indecent attire and postures for pay. See *R. v. Saunders*, 13 Cox C. C. 116; *L. R. 1 Q. B. D. 15*. A conviction, under a similar indictment, was sustained in Philadelphia, in June, 1848.

attitudes, positions, and postures, to the manifest corruption of the morals as well of youth as of other good and worthy citizens of the state of New York, in open violation of decency and good order, to the great damage, and common nuisance, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

That the said E. F., afterwards, to wit, on the day and year last aforesaid, at the ward, city, and county aforesaid, was the keeper of a certain public place of amusement known and designated as the Chatham theatre, at which public place of amusement the said E. F. did exhibit, and cause and procure to be exhibited, for money, certain persons, men as well as women, in various lascivious, wicked, impudent, lewd, obscene, and indecent groupings, attitudes, postures, and positions, to the manifest corruption of the morals as well of youth as of other good and worthy citizens of the state of New York, in open violation of decency and good order, to the great damage and common nuisance, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

That the said E. F., afterwards, to wit, on the day and year last aforesaid, at the ward, city, and county aforesaid, and on divers other days and times between that day and the day of the taking of this inquisition, at the ward, city, and county aforesaid, with force and arms, wickedly and unlawfully did exhibit and show for money to divers persons whose names are to the jurors aforesaid unknown, a certain lewd, wicked, scandalous, infamous, and obscene representation, exhibiting certain living men and women, whose names are to the jurors aforesaid also unknown, in divers lewd, lascivious, wicked, indecent, and obscene groupings, attitudes, postures, and positions, to the manifest corruption of morals, in open violation of decency and good order, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(767) *Bathing publicly near public ways and habitations.*(y)

That H. O. G., late of unlawfully, scandalously, indecently, deliberately, and wilfully did expose and exhibit himself naked near to and in front of divers houses of the good people of the said state, situate at, etc., aforesaid, and also near to a certain public and common highway there, and also in the presence of the good people of the said state, both male and female, with intent to vitiate and corrupt the morals of the said people of the state, to the common nuisance, etc., and against, etc.(z) (*Conclude as in book 1, chapter 3.*)

Second count. Unlawful exposure.

That the said H. O. G., on, etc., at, etc., unlawfully (scandalously, indecently), deliberately, and wilfully did expose himself naked to divers of the good people of the state, against, etc. (*Conclude as in book 1, chapter 3.*)

(768) *Public exposure of naked person.*(a)

That J. S., late, etc., being a scandalous and evil disposed person, and devising, contriving, and intending the morals of divers good people of the said state to debauch and corrupt, on, etc., at, etc., on a certain public and common highway there situate, in the presence of divers(b) good people of the said state then and there being, and within sight and view of divers other liege citizens through and on the said highway then and there passing and repassing, unlawfully, wickedly, and scandalously did expose to the view of the said persons present, and

(y) Dickinson's Q. S. 6th ed. 393.

(z) Undressing on a beach and bathing in the sea, so near inhabited houses as to be distinctly visible from them, is an offence, though the houses are recently erected, and the bathing at that place was previously general. *R. v. Crunden*, 2 Campb. 89; 1 Sid. 68; 1 Keb. 620; 2 Stran. 796; *State v. Millard*, 18 Vt. 574; Dickinson's Q. S. 6th ed. 394; 2 Chit. C. L. 41; Wh. Cr. L. 8th ed. § 1470.

(a) This form is given by Mr. Archbold (C. P. 5th Am. ed. 774), who cites the following authorities: *R. v. Sedly*, 10 St. Tr. Ap. 93; 1 Sid. 168; 1 Keb. 620; and see *R. v. Gallaro*, 1 Sess. Ca. 231; *R. v. Crunden*, 2 Campb. 89; 1 B. & Ad. 933; *R. v. Powell*, 3 Q. B. 180; 2 Gale & D. 518. See, in addition to above, *R. v. Holmes*, 6 Cox, C. C. 216; *R. v. Harris*, 11 Cox, C. C. 659; *Com. v. Haynes*, 2 Gray, 72; *Arderg v. State*, 56 Ind. 328; *Moffit v. State*, 43 Tex. 346.

(b) There must be a *public* exposure. It is not enough to aver an exposure to an individual. Wh. Cr. L. 8th ed. § 1469.

so passing and repassing as aforesaid, the body and person of him the said J. S. naked and uncovered for a long space of time, to wit, for the space of one hour, to the great scandal, etc.

(768a) *Another form.*

The jurors for, etc., upon their oath present, that S. H. and H. C., on, etc., in a certain urinal frequented and resorted to by many of the liege subjects of our lady the queen, for a necessary purpose, and in a certain open and public place called H. P., situate, etc., and near and adjacent to a certain highway and footpath there situate, and in the sight and view of many of the liege subjects of, etc., then and there being, and then and there passing and repassing, did meet together for the purpose of committing with each other divers lewd and unnatural practices, and did then and there commit and perpetrate with each other divers such practices as aforesaid, and that he the said S. H. did then and there in such open and public place as aforesaid, and within the sight and view of such persons as aforesaid, unlawfully and wickedly expose [then followed a specific averment of the lewd practices], to the great damage and common nuisance of all the liege subjects of our said lady the queen then and there being, and then and there passing and repassing, against the peace, etc.(c) (*Conclude as in book 1, chapter 3.*)

(769) *Exposing the private parts in an indecent posture.*(d)

That H. O. G., late of, etc., and intending as much as in him lay to vitiate and corrupt the morals of the good people of the said state, and to stir up and excite in their minds filthy, lewd, and unchaste desires and inclinations, on, etc., at, etc., unlawfully, wickedly, deliberately, and wilfully did expose and exhibit his private parts, in an indecent posture, situation, and practice,

(c) Under this indictment it was held that a "urinal" was a "public place." R. v. Harris, 11 Cox, C. C. 659. Wh. Cr. L. 8th ed. § 1470.

(d) Dickinson's Q. S. 6th ed. 394.

Where an indictment contained two counts, two instances of exposure were allowed to be given in evidence, viz., one on each of two separate days, or two separate instances on the same day; for, as the day laid in the first count was immaterial, exposure on another day may be proved on that count. Then as the second count charged the offence as done on the "day and year aforesaid," a second exposure, viz., the day laid in the first count, may be shown; and if different days are laid in different counts, any number of acts of exposure may be shown. Rowbattel's case, 1 Lew. C. C. R. 83.

to the good people, both male and female, of the said state, with intent to vitiate and corrupt the morals of the good people, and to stir up and excite in their minds filthy, lewd, and unchaste desires and inclinations, against, etc. (*Conclude as in book 1, chapter 3.*)

(770) *Same under § 8, ch. 444, Vermont Rev. Sts. First count, exposure to divers persons, etc.(e)*

That A. B., on, etc., did expose and exhibit his private parts, in a most indecent situation and posture, to divers persons, with

(e) *State v. Millard*, 18 Vt. 575. The opinion of the court was delivered by Williams, C. J.—“In this case the respondent excepted to the charge of the court, and also to their decision, in overruling the motion in arrest; on both which points we think the decision was correct.

“The statute (Rev. Sts. 444, § 8) provides, that if any man or woman, married or unmarried, shall be guilty of open and gross lewdness and lascivious behavior, etc., he shall be imprisoned in the common jail not more than two years, or fined not exceeding three hundred dollars. No particular definition is given, by the statute, of what constitutes this crime. The delicacy of the subject forbids it, and does not require of the court to state what particular conduct will constitute the offence. The common sense of the community, as well as the sense of decency, propriety, and morality, which most people entertain, is sufficient to apply the statute to each particular case, and point out what particular conduct is rendered criminal by it.

“That the conduct of the respondent, in this case, was lewd and lascivious, is beyond question. A public exposure of himself to a female, in the manner this respondent did, with a view to excite unchaste feelings and passions in her and to induce her to yield to his wishes, is lewd, and is gross lewdness, calculated to outrage the feelings of the person to whom he thus exposed himself, and to show that all sense of decency, chastity, or propriety of conduct was wanting in him, and that he was a proper subject for the animadversion of criminal jurisprudence.

“That this lewdness was *open*—which under this statute must be considered as undisguised, not concealed, and opposite to private, concealed, and unseen—is also evident. There was no desire or wish for concealment; and, so far as the female was in his view, he exposed himself to her with the intent and design that she should see him thus exposed. The crime cannot be made to depend on the number of persons to whom a person thus exposes himself, whether one or many. Indeed, the offence in this case is more glaring and gross than in the case of *Sir Charles Sedley* (1 Sid. 168; 1 Keb. 620), or of the man who bathed in a public place. *R. v. Crunden*, 2 Campb. 89. In those cases there was a disregard of decency, without any design to outrage the feelings of any individuals, or to excite any improper desires or feelings in them. In the case before us, such motives evidently actuated the respondent.

“I am not prepared to say, that the conduct of the respondent would not have been indictable at common law, notwithstanding the intimation to the contrary in the case of *Fowler v. The State*, 5 Day, 81. There is a precedent of an indictment against one Bennett, in 2 Chit. 41, on which he was convicted, which would have been sustained by the same evidence produced against this respondent.

“Of the soundness of the decision in *Com. v. Catlin* (1 Mass. 8), we have nothing to say, and only remark that, in that case, the lewdness was designed

intent to excite in their minds lewd and unchaste desires and inclinations, etc.

(771) *Second count. Exposure in the presence of one Polly P.*

That the said A. B., on, etc., did commit open and gross lewdness and lascivious behavior, and did then and there lewdly and lasciviously expose his private parts in a most indecent posture and situation, in the presence of one P. P., (f) with intent to excite in her mind, etc. (*as in last count*).

(772) *Third count. Exposure in the presence of Polly P. and divers other persons to the jurors unknown.*

That the respondent, said A. B., etc., intending to corrupt the manners and morals of the people, did commit open and gross lewdness and lascivious behavior, and did then and there lewdly and lasciviously expose and exhibit his private parts in the presence of one P. P., and in the presence of divers other persons to the jurors unknown, etc.

(773) *Another form of the same in North Carolina, there being no allegation of the presence of lookers-on. (g)*

That S. R., late of, etc., on, etc., at, etc., being an evil disposed person, and contriving and intending to debauch and corrupt the

to be private, and it was rather accidental that the offenders were discovered; and in this particular the case is essentially different from the one before us.

"No other objections have been urged in the argument. The indictment, in the second and third counts, has followed the words of the statute. Judgment must be rendered on the verdict, and the respondent sentenced."

(f) This, if pleaded as such, may be a misdemeanor, as a solicitation to unchastity. But see Wh. Cr. L. 8th ed. § 179. But it is not indictable as a nuisance. *R. v. Webb*, 1 Den. C. C. 338; 2 Cox, C. C. 376.

(g) *State v. Roper*, 1 Dev. & Bat. 208.

Gaston, J., after stating the case, proceeded: "We consider it a clear proposition, that every act which openly outrages decency, and tends to the corruption of the public morals, is a misdemeanor at common law. A public exposure of the naked person is among the most offensive of those outrages on decency and public morality. It is not necessary to the constitution of the criminal act, that the disgusting exhibition should have been actually seen by the public; it is enough if the circumstances under which it was obtruded, were such as to render it probable that it would be publicly seen; thereby endangering a shock to modest feeling, manifesting a contempt for the laws of decency. In the description of every indictable offence, it is always advisable that the charge should be made to conform to approved precedents. A departure from them is viewed with suspicion. Yet where there are no precise technical expressions and terms

morals of the citizens of the said county, on a certain public highway in said county, did indecently and scandalously expose to public view the private parts of him the said R., to the evil and pernicious example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

LEWDNESS AND DRUNKENNESS.

(774) *Lewdness and lascivious cohabitation in Massachusetts. First count, lascivious behavior by lying in bed openly with a woman.*

That A. B., of, etc., on, etc., and from that day to the day of being then and there a married man (and having a lawful wife alive), did commit open, gross, and lascivious behavior, and did then and there lewdly and lasciviously lie on a bed with one C. F. (a single woman), she the said C. F. then and there not being the wife of the said A. B., against, etc. (*Conclude as in book 1, chapter 3.*)

(775) *Second count. Lascivious behavior, by putting the arms openly about a woman, etc.*

That said A. B., at, etc., on the day and year aforesaid, being then and there a married man, and having a lawful wife alive,

of art required, so appropriated by the law to the description of an offence as not to admit a substitute for them, it is sufficient that the indictment charges in intelligible language, with distinctness and certainty, all the substantial circumstances which constitute the offence. In 2 Chit. C. L. 41, we have a precedent of the indictment which was used in the case of *The King v. Crunden*. It consists of two counts. The first charges that he exposed himself naked and in an indecent posture, near to and in front of divers houses, and also near to a certain public highway, and also in the presence of divers of the king's subjects; the second charges that he exposed himself naked to divers of his majesty's subjects. In 2 Campbell's Rep. p. 89, we have a report of the case. The defendant was convicted on evidence that he bathed in the sea, dressing and undressing on the beach, opposite to the East Cliff at Brighton, on which cliff there was a row of inhabited houses, from the windows of which he *might* be distinctly seen, as he was undressed and swam in the sea. The allegation, that this indecent exhibition was made in the presence of divers persons, was satisfied by proof that it took place in their vicinity, and so that it might have been seen. The allegation means no more, and any other allegation which distinctly and especially avers as much, will as effectually answer to describe the offence. The averments in this indictment, that on a certain public highway the defendant did indecently and scandalously expose to *public view*, can mean nothing less than that the indecent exposition was so made that it might have been seen by *numbers*. The necessary constituents of the crime are therefore stated, and there was no error in overruling the motion in arrest." To the same effect is *Fowler v. State*, 5 Day, 81; *State v. Grisham*, 2 Yerg. 589. See 776 and note to same; see also next note.

was guilty of open, gross lewdness, and lascivious behavior (by openly, lewdly, grossly, and lasciviously putting his arms about the said C. F.), (she the said C. F. then and there being a single woman, and not being the wife of the said A. B.), against, etc. (h) (*Conclude as in book 1, chapter 3.*)

(776) *Lascivious cohabitation at common law.*(i)

That A. B., yeoman, and C. D., spinster, being scandalous and evil disposed persons, on, etc., at, etc., devising and intending the

(h) These counts were framed under the statute of 1784, ch. 40, and were brought before the supreme court in *Com. v. Catlin*, 1 Mass. 9. Nothing but secret lewdness was proved on trial (the principal witness having peeped through the window), and as the jury were directed to acquit, the indictment was not tested. The averments in brackets are not in the original, though it would be safer to insert them. The offence charged in the first count, if indicted as a nuisance, and publicity and scandal be alleged, is indictable at common law. *Wh. Cr. L.* 8th ed. § 1446; *infra*, 776. Under the Massachusetts statute a single act of cohabitation does not constitute the offence; there must be a continuance of cohabitation, of a public nature, tending to corrupt public morals. *Com. v. Calef*, 10 Mass. 153. The part in brackets in the second count may, it seems, be omitted. *Tr. & H. Prec.* 352.

(i) *State v. Grisham*, 2 Yerg. 589. "It is insisted for the plaintiff in error," said the court, "that to support the criminal allegations in the presentment, which, it is argued, amount to open and notorious lewdness, the acts stated must be shown to have been committed in public, such as in the streets of a town, or elsewhere exposed to the view of divers persons. And the case of *Com. v. Catlin* (1 Mass. Rep. 8) was cited. That was an indictment brought on a statute of the state of Massachusetts, the provisions of which are not stated in the report, and the statute itself has not been seen. The report of the case in the book is, that on an indictment under the statute for open and gross lewdness and lascivious behavior, evidence of lewdness, or such behavior in secret, will not support the indictment. The case, therefore, wholly dependent upon the particular provisions of a statute, can have but little, if any, application to the present case, which is a presentment at the common law. It will not, therefore, be remarked upon or further noticed.

"The common law is the guardian of the morals of the people, and their protection against offences notoriously against public decency and good manners; and Blackstone says, that open and notorious lewdness, either by frequenting houses of ill-fame, which is an indictable offence, or by some grossly scandalous and public indecency, is cognizable by the temporal courts. At one time in England, the superintending care and concern of the law for the advancement of public morality, was carried to so great an extent, that incest and adultery were made capital offences, and the repeated acts of keeping a brothel, or committing fornication, were (upon a second conviction) made felony without the benefit of the clergy. This statute was made during the commonwealth, when the ruling powers, says Blackstone, found it to their interest to put on the semblance of very extraordinary strictness and purity of morals; but it was not thought proper at the restoration to revive this statute and renew it, being of such unfashionable rigor; since which time these offences have been left to the feeble coercion of the spiritual, and the temporal courts take no cognizance of the crime of adultery, otherwise than as a private injury. See 4 Bla. Com. 64, 65.

"This is the substance of Judge Blackstone's review of the law of England

morals of the citizens of the said state to debauch and corrupt, on, etc., and on divers other days and nights between that day

upon the offences of adultery and fornication, and the other offences noticed ; upon which it appears that even in England at this day, the case made by this record is the proper subject of an indictment, that is, a grossly scandalous and public indecency, for which the punishment is by fine and imprisonment. When Judge Blackstone says, that the crime of adultery is not taken into cognizance by the temporal courts, this is to be understood of secret and private adultery ; for if open and notorious, it comes within his description of a grossly scandalous and public indecency.

“ But let it be understood that though the temporal courts in England have no cognizance of the crime of adultery or fornication, when secret and private and confined to single instances, yet they are not thereby legalized or rendered punishable as not being offences ; they continue offences there still, but their cognizance is transferred and assigned to the spiritual court, who punish according to the rule of the canon law. It cannot follow as a consequence, that an offence which is common to both the law of England and this state, and is animadverted upon by the law of England, and punished by the spiritual court there, shall escape like animadversion of the law and punishment here, because we have not a spiritual court ; but it rather follows from analogy that our county courts of pleas and quarter sessions have the jurisdiction in these matters, as we find that matters, the proper tribunal of which was the spiritual court in England, are in this state, when not repugnant to our constitution and form of government, assigned to the county courts, as the probate of wills and testaments, the granting of letters of administration, etc.

“ But in addition to analogy, we have the express authority of the common law, as declared by the judges in the courts of justice, who, as Blackstone observes, are the living oracles and depositaries of the law (see 1 Bl. Com. 68, 69) ; that all offences against good morals are cognizable and punishable in the temporal courts, that are not particularly assigned to the spiritual court. Thus, in the case of *The King v. Sir Francis Blake Delaval* (Burr. Rep. 1434), Lord Mansfield says : ‘ It is true that many offences of the incontinent kind fall properly under the jurisdiction of the ecclesiastical court, and are appropriated to it ; but if you except those appropriated cases, this court is the *custos morum* (the guardian of the morals of the people), and has the superintendency of offences *contra bonos mores*’ (against good manners) ; and upon this ground he adds, ‘ both Sir Charles Sedley and Curl, who had been guilty of offences against good manners, were prosecuted here.’ Thus we find that the common law (independent of any statutes) is the guardian of the morals of the people, takes cognizance of offences against good manners, and this cognizance belongs to the temporal courts in England, in all those cases where there is not an appropriation of them to the spiritual court.

“ The result of this view of the law is, that acts or conduct notoriously against public decency and good manners constitute an offence at common law, cognizable by the temporal courts, even in England, as in the case above cited, of *The King v. Delaval*, which was for notoriously living with a kept mistress ; and in the cases of Sir Charles Sedley and Curl, above mentioned, who had been guilty of offences against good manners. Now, what is the gist of the above prosecutions ? It is this, that the act or acts, or particular conduct charged, lie notorious and against good manners, not that they should have been committed in the public streets, or elsewhere exposed to the view of divers spectators. Such an exhibition as this is not necessary to satisfy the term notorious, and portray its character and import. The requisition of the term notorious, or notoriously, in the constitution of an offence of the nature spoken of, is sufficiently answered if the act is done in such a manner, or under such circumstances, as necessarily to be-

and the day of taking this inquisition, and for all the time aforesaid, in the county aforesaid, in the presence and view of divers good citizens, and in the face of the country, unlawfully, wilfully, wickedly, and scandalously did then and there live, cohabit, and use together as man and wife, in lewd acts of fornication and adultery, openly, notoriously, and publicly, they not being married, to the great scandal (and common nuisance) of the said good and worthy citizens of the said state, to the manifest corruption of their and the public morals, in contempt of the said state and the laws of the land, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(777) *Lewdness, etc., by a man and woman unlawfully cohabiting and living together.*(j)

That on, etc., and upon divers other days between that day and the day of the filing of the indictment, E. C., of the county of Sevier, laborer, and B. B., of the same county, spinster, being persons of evil disposition, and designing to corrupt the morals of the people of the said state, unlawfully (notoriously openly and publicly) did live, dwell, and cohabit together in lewdness and adultery, in the county of Sevier, they being unmarried to and with each other, etc.

(778) *Notorious drunkenness.*(k)

That R. T., on, etc., at, etc., and on divers other days before that time, was openly and notoriously drunk (on the highways

come public, or generally known in the neighborhood; as in the case before Lord Hardwicke, where it appeared in a cause in the court of chancery that a man had formally assigned his wife over to another man, Lord Hardwicke directed a prosecution for that transaction, as being notoriously against the public decency and good morals.

“Thirdly, it is objected that there is error in the charge of the court. As to this, it need only be observed, that if there is any error in the charge, it is in favor of the plaintiffs in error, in requiring circumstances not necessary to be shown in the proof in the present case, for the purpose of supporting the prosecution, as presenting themselves at public worship,” etc. On this point see Wh. Cr. L. 8th ed. § 1446.

(j) *State v. Cagle*, 2 Humph. 414.

In this case the judgment was arrested by the circuit court, upon the ground that the living, dwelling, and cohabiting together in lewdness and adultery, being unmarried, is not charged in the indictment to have been notorious. The allegation of notoriety, however, if necessary, is sufficiently made by the terms “openly and publicly.” Wh. Cr. L. 8th ed. § 1446.

(k) *Tipton v. State*, 2 Yerg. 542. See Wh. Cr. L. 8th ed. § 1447.

“As to the second reason is arrest of judgment, that the indictment does not

of said county, and in public view of all citizens of said state then and there passing and repassing),^(l) to the disturbance of the public peace, to the great injury of the public morals of the good citizens of the state, to the evil example, etc., to the common nuisance, etc.,^(m) and against, etc. (*Conclude as in book 1, chapter 3.*)

(779) *Against a common scold.*(n)

That M. S., late of, etc., on, etc., and at divers other days and times as well before as since, at, etc., was and is a common scold and disturber of the peace of the neighborhood, and of all faithful citizens of this commonwealth, to the common nuisance, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(779a) *Against night-walker.*(o)

That A. B., etc., at, etc., on, etc., "was a common night-

charge the defendant as a common drunkard, and a nuisance to society, it cannot prevail. The assignment of this error is in effect substantially the same with the charge in the indictment, for the indictment does not charge a single act of drunkenness alone, but repeated acts of the like kind. It charges 'that the said Reuben Tipton, on the second day of August, 1830, and on divers other days before that time, was openly and notoriously drunk.' This shows that the offence was a common thing with the defendant. But it is argued, that a man may be drunk as often as he pleases in his own house, which is only a private injury to himself, and in which the public is not concerned. Suppose this reasoning were admissible, the indictment negatives its application in the present case, for the charge is, that the defendant was drunk, openly and notoriously, to the disturbance of the public peace, and to the great injury of the public morals of the good citizens of the state. Can it be said that this conduct is not an injury to the public, and an evil example? The contrary but too often appears, and that, too, either accompanied with or followed by fatal consequences.

"The pernicious influence of an evil example is plain to every reflecting mind, and the powerful influence of this vice upon society, not only in its effects on the relations of private life, but also as being the origin, the fomentor, and the promoter of the greater portion of the public crime of the country, proves it to be, what it is, an indictable offence. The judgment of the circuit court was correct and must be affirmed." *Tipton v. State, ut sup.*

See *supra*, 705, note.

(l) Some such allegation as this is advisable at common law. *State v. Walker*, 3 Murphy, 229.

(m) This is not necessary in Massachusetts. *Com. v. Boon*, 2 Gray, 174.

(n) This form is sufficiently explicit. *James v. Com.*, 12 S. & R. 220; *Com. v. Pray*, 13 Pick. 359; *Com. v. Mohn*, 52 Penn. St. R. 243; 6 Mod. 311; 9 Cow 587. See Wh. Cr. L. 8th ed. § 1442.

(o) Sustained as good at common law and under New Hampshire statute. *State v. Dowers*, 45 N. H. 543. See Wh. Cr. L. 8th ed. § 1444a.

walker, and from the said tenth day of July to the filing of this complaint, during divers nights within the time aforesaid, did walk and ramble in the streets and common highways, in the said city of Portsmouth, at unseasonable hours of said nights, without having any lawful business, and without any necessity therefor, against good morals and good manners," to the common nuisance, etc.

(780) *Barratry.*(p)

That A. B., late of, etc., on, etc., and on divers other days and times, at, etc., was and yet is a common barrator; and that he the said A. B., on the said, etc., and on divers other days and times, in the county aforesaid, divers quarrels, strifes, and controversies among the honest and quiet good people of the state did unlawfully move, procure, stir up, and excite, to the common nuisance, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

TRAMPS.

(780a) *Tramps under Pennsylvania statute.*

That A. B., etc., on the day of in the year of our Lord one thousand eight hundred and and on divers other days and times before the day and year aforesaid, at the county aforesaid, and within the jurisdiction of this court, unlawfully did go about from place to place begging, and asking and subsisting upon charity, for the purpose of acquiring money and a living; the said A. B. then and there not being a female, and then and there not being a minor under the age of sixteen years, and then and there not being blind, and then and there not being deaf, and then and there not being dumb, and then and there not being a maimed and crippled person unable to perform manual labor, and having then no fixed place of residence, and no lawful oc-

(p) Hawk. b. 2, c. 25, s. 59.

Barratry is the *habitual* moving and exciting or maintaining suits and quarrels, either at law or otherwise (Co. Lit. 368), and consists not in any single act, however flagrant, but in a succession of acts, constituting a course of behavior. Hawk. b. 2, c. 25, s. 59. It is not, therefore, necessary to specify in the indictment the particular acts on which the prosecutor relies; but the court will compel him before the trial, to inform the defendant in a written notice of those particulars, and will exclude him from offering evidence of any errors. Per Ashurst, J., in *Anson v. Stuart*, 1 T. R. 754; and see *Dickinson's Q. S.* 217, 218.

cupation in the city and county of Philadelphia aforesaid, the said city and county of Philadelphia then and there being the city and county in which the said A. B. then and there was arrested; and then and there unlawfully was a tramp, contrary, etc.(q) (*Conclude as in book 1, chapter 3.*)

NON-REPAIRING ROADS, ETC.

(781) *Against inhabitants of a township, for not repairing a highway situate within the township* (r)

That on, etc., there was and still is a certain common and public highway, leading from, etc., to, etc., used for all the good

(q) For the above I am indebted (1881) to Mr. Ker, formerly district attorney in Philadelphia.

(r) Dickinson's Q. S. 6th ed. 409. See Wh. Cr. L. 8th ed. § 1485.

In connection with this class of indictments will be considered,—

(1) The obligation to repair highways and bridges.

(2) Nuisances arising from a neglect of this obligation.

(3) Requisites of indictment for the offence.

(1) *Obligation to repair highways and bridges.*

At common law the obligation to repair all highways lies on the parishes through which they pass; each being liable to repair such portions or bounds as are situate in its respective limits (1 Hawk. b. 1, c. 76, s. 5); and at common law a like obligation is imposed on counties to repair all public bridges within their boundaries (see p. 400, Dickinson's Q. S.); which obligation, since the statute of bridges, extends not merely to the bridge itself, but to the roads at each end. R. v. Yorkshire (West Riding Inhab.), 7 East, 588; affirmed on error in Dom. Proc. 5 Taunt. 284, S. C. Nor does the rule differ in the case of a body corporate (or private person), liable by *prescription* to repair a bridge; and this, though the repairs done by the parties liable have been confined to the fabric of the bridge, and those to the approaches have been done by turnpike commissioners (R. v. Lincoln (Mayor and City of), 8 A. & E. 65; 3 N. & P. 273, S. C.); for as early as the reign of Edward III. the approaches to a bridge, the fabric of which, but not the *finis ejusdem pontis*, an ecclesiastical corporation sole was bound by prescription to repair, were yet held by the judges to be excrescences of the bridge itself, and as such, *prima facie* repairable by the same party as the bridge itself (Abbot of Combe's case, 43 Ass. 275, B. pl. 37); the extent of which last liability is fixed by 22 Hen. VIII. c. 5, s. 9, at three hundred feet "from any of the ends of it."

(2) *Nuisances by omitting to repair public highways and bridges.*

The consideration of prosecutions for the non-repair of highways and bridges, differs essentially from that of other parts of the criminal law; for though in form they are criminal proceedings, in practice they are usually resorted to as modes of trying disputed questions of a liability to repair, for no action lies by an individual against the inhabitants of a county for an injury sustained in consequence of a public bridge being out of repair. Russell and others v. The Men Dwelling in the County of Devon, 2 T. R. 667, and cases collected; Rose v. Groves, R. L. J. (C. P.) 252. Not only on the account, but in consequence of the fact that the proceedings are different in each state, depending almost entirely on local legislation, no attempt is made to lay down the law on the subject

citizens of the said state, with their horses, coaches, carts, and carriages to go, return, pass, ride, and labor, at their free will and

as regulated by statute. See authorities grouped in Wh. Cr. L. 8th ed. §§ 1485 *et seq.*

(3) *Requisites of indictment against parishes or counties for not repairing highways or bridges.*

Indictments against a parish for the common nuisance of not repairing highways, and indictments and presentments against a county for not repairing bridges, must allege affirmatively that the way or bridge is public; and that it lies *within* the parish or county which is alleged to be bound to repair. *Halsey's case*, Latch. 183, cited 1 H. Bla. 356. "*To*" *Kensington* held to exclude *Kensington*. *Ib.* "From and to" do not necessarily exclude the place named (*R. v. Knight*, 7 B. & C. 413); though so held in *R. v. Gamlingay*, 3 T. R. 513; 1 Leach C. C. 528, S. C.; and again since *R. v. Knight*, in *R. v. Botfield*, 1 C. & M. 151 (*R. v. Knight* not cited). See *R. v. Camfield*, 6 Esp. 136; *R. v. Steventon*, C. & K. 55. "From and through" places named, is said to exclude the *termini*. *R. v. Upton*, 6 C. & P. 133, per Tindal, C. J. As to "towards," see 3 A. & E. 181, *Lempriere v. Humphrey*; and 1 East, 377; *Wright v. Rat-tray* (cited in 7 B. & C. 266; *De Beauvoir v. Welch*); *Rouse v. Bardin*, 1 H. Bla. 351. "Abutting on," see 3 A. & E. 183. "Towards and unto B.," are satisfied by a line of way to B. which turns backwards in the middle, and then returns to B. by a way recently dedicated. *R. v. Devonshire (Marchioness)*, 4 A. & E. 232. "From and through the town of U. towards the parish of G.," excludes (*Hammond v. Brewer*, 1 Burr. 376) the *terminus* U., so as not to permit a prosecutor to show a road in U. to be out of repair (*R. v. Upton-on-Severn*, 6 C. & P. 134, per Tindal, C. J.); for though a township is not necessarily contiguous with a parish, it may be bound by custom to repair a highway within it. "From the town of C. to a place called H. hill, and that defendant illegally erected gates between the said town of C. and H. hill," *Patteson J.*, held the town excluded. *R. v. Fisher et al.*, 8 C. & P. 612; 2 Saund. 158, a, n. 69; *Dickinson's Q. S.* 401.

The indictment must also charge the bridge to be out of repair, and should conclude by alleging that the inhabitants of the county or parish, or that a corporation aggregate, or a railway or canal, etc., company, are bound to repair it. *R. v. Birmingham and Gloucester Railway Company*, 9 C. & P. 409; *Parke B.*; 1 Gale & D. 457, S. C.; 2 Q. B. R. 47, 233. If the bridge or way was a highway for all purposes (*i. e.* public), at the time of the nuisance committed in not repairing, etc., or in obstructing it, the term *highway* is sufficient, the words "common and public" being mere repetition (2 Saund. 158, note (4), citing *Aspidall v. Brown*, 3 T. R. 265); but if the highway is stated to have been such from time immemorial, which is unnecessary, the prosecution would fail, should it appear that sixty years ago it was put an end to by the inclosure act, though it has been since used and repaired by the district indicted. 2 Saund. 158, d; *Dyer*, fol. 33; *R. v. Jones*, 2 B. & Ad. 611; *R. v. Hollingberry*, 4 B. & C. 329; *R. v. Westmark (Tithing)*, 2 M. & Rob. 305, Maule, J. If there be a limitation in the right of way, as if it is only used by the public when it is dangerous to pass through an adjacent stream, such limitation should be stated. *Allen v. Ormond*, 8 East, 4, note (a); *R. v. Northamptonshire (Inhab.)*, 2 M. & S. 262. An allegation of a "pack and prime" way is not supported by proof of a "carriage" way, and the defendant will be acquitted. *R. v. St. Leonard's*, 6 C. & P. 582, Alderson, J. It is not necessary to state the *termini* of the way, but when stated they must be proved, and a variance in this respect will be fatal. *Rouse v. Bardin*, 1 H. Bla. 351; 6 C. & P. 582. It is usual to state the extent of the way which is out of repair; but it may be doubted whether this is necessary; however, though the court does not at present estimate the fine from the

pleasure, and that a certain part of the said highway, situate, lying, and being in the township of, etc., containing in length, etc., and in breadth, etc., on, etc.,(s) and from thence continually afterwards until the day of the taking of this inquisition, at the township aforesaid, in the county aforesaid, was and yet is very ruinous, miry, deep, broken, and in great decay for want of due reparation and amendment of the same, so that the citizens of the said state through the same way with their horses, coaches, carts, and wagons could not during the time aforesaid, nor yet can go, return, pass, ride, and labor, without great damage of their lives and loss of their goods. And that the inhabitants of the said township of, etc., in the county aforesaid, have used and been accustomed to repair and to amend, and of right ought to have repaired and amended, and still of right ought to repair and amend, the said highway,(t) so being in decay as aforesaid, when and so often as it hath been and shall be necessary; to the great damage and common nuisance, etc., through the same way going, returning, passing, riding, and laboring, and against, etc.(u) (*Conclude as in book 1, chapter 3.*)

description of the length and breadth of the nuisance, its insertion cannot prejudice. 2 Saund. 158, note 7. Objection to the too general description of a road in an indictment can only be taken by plea in abatement (*R. v. Hammer-smith* (Inhab.), 1 Stark. 357), *e. g.*, by stating that the road described in the plea was equally well known by the description given in the indictment. When the indictment is against an individual, or select body, on a peculiar obligation against common right, it is not sufficient to state a liability to repair, but it is necessary to show how that liability arises, as "by reason of the tenure or inclosure of certain lands:" or, in the case of an extra-parochial hamlet or hundred not otherwise liable, a usage "from time immemorial." 2 Saund. 158, note 9; *R. v. Kingsmoor* (Inhab.), 2 B. & C. 190. The inhabitants of the several townships in a parish may be conjointly indicted for not repairing a road in it. *R. v. Auckland* (Inhab. of three townships named), 1 A. & E. 744; S. C., 1 M. & Rob. 286; see 2 B. & C. 166, *R. v. Machynlesh*; Dickinson's Q. S. 6th ed. 402.

(s) The termini must be proved as laid. *State v. Northumberland*, 46 N. H. 156; *State v. Graham*, 15 Rich. (S. C.) 310; though see, *contra*, *State v. Harsh*, 6 Blackf. 346.

(t) The duty must be averred. *State v. King*, 13 Ired. 411; *State v. Commissioner, Walker*, 368.

(u) See *R. v. Heege* (Inhab.), 2 Q. B. 128. Custom laid to repair *all common and public highways situate within the said township* is not necessarily bad, but it seems better to add in such a case "that would otherwise be repairable by the parish comprising such township" (*R. v. Hatfield*, 4 B. & Al. 75; *R. v. Bridekirk*, 11 East, 304; see 1 B. & Al. 352, 356); for that averment does not make it necessary to prove that there are or have been ancient highways in the said township. *R. v. Barnoldswich* (Inhab.), 12 L. J. (M. C.) 44; 42 B. 499, S. C.

Dickinson's Q. S. 6th ed. 410.

(782) *Against a county for suffering a public bridge to decay.*(v)

That on, etc., there was and from thence hitherto hath been and still is, a certain common and public bridge, commonly called High-bridge, otherwise Haigh-bridge, situate and being in the parish of B., in the county of N., in the common highway leading from the town of B., in the county aforesaid, towards and unto the town of C., in the same county, being a common highway for all the good citizens of the said state, on foot and with their horses, coaches, carts, and other carriages, to go, return, pass, repass, ride, and labor, and that the said common and public bridge, on the said, etc., aforesaid, and continually, from thence until the day of the taking of this inquisition, at the parish of B. aforesaid, in the county aforesaid, was and yet is ruinous, broken, dangerous, and in great decay for want of needful and necessary upholding, maintaining, amending, and repairing the same, so that the good citizens of the said state in, upon, and over the said bridge, on foot and with horses, coaches, carts, and carriages could not, and cannot pass and repass, ride and labor, without great danger of their lives and loss of their goods, as they ought and were accustomed to do, and still of right ought to do: And that the inhabitants of the county of N. aforesaid of right have been, and still of right are, bound to repair and amend the said common bridge, when and so often as it shall be necessary; to the great damage and common nuisance of all the said citizens, upon and over the said bridge, on foot and with their horses, coaches, carts, and other carriages, about their necessary affairs and business going, returning, passing, riding, and laboring; against, etc. (*Conclude as in book 1, chapter 3.*)

(783) *Against the inhabitants of a parish for not repairing a common highway.*(w)

That on, etc.(x) there was and yet is a certain common and

(v) Dickinson's Q. S. 6th ed. 412.

(w) Dickinson's Q. S. 6th ed. 408.

(x) Allegation of the antiquity of the road is now commonly omitted, and the language generally runs as above, or that "long before, and at the time of the commencement of the nuisance hereinafter mentioned, there was, and of right ought to be," etc. 3 T. R. 265. A way may be described as a common highway for carts, carriages, etc., though it has been always arched over, if, though

ancient highway(y) leading from, etc., towards and unto, etc., used for all the state's citizens, with their horses, coaches, carts, and carriages to go, return, pass, and repass, at their will and pleasure; and that a certain part of the same common highway situate, lying, and being in the parish, etc., of A. B., in the same (county), containing in length, etc., in breadth, etc., on, etc.,(z) and continually afterwards until the present day, was and yet is very ruinous, deep, broken, and in great decay, for want of due reparation and amendments, so that the citizens of the state through the same way, with their horses, coaches, carts, and carriages could not, during the time aforesaid, nor yet can go, return, pass, or repass, as they ought and were wont to do: And that the inhabitants of the parish of A. B. aforesaid, in, etc., aforesaid, the said common highway (so in decay) ought to have repaired and amended, and still of right ought to repair and amend, when and as often as it should, shall, or may be necessary; to the great damage and common nuisance(a) of all the people of the state through the same highway, going, returning, or passing, and against, etc. (*Conclude as in book 1, chapter 3.*)

(784) *Against a corporation of a town, for suffering a watercourse which supplied the inhabitants with water, and which they were bound to cleanse, etc., to be filthy and unwholesome.*(b)

That from time whereof the memory of man is not to the contrary, there was and still is a certain and ancient water-

not high enough to let every highway wagon pass under it, it will admit common carriages to pass. *R. v. Lyon et al.*, 1 C. & P. 527; *R. & M. N. P. C.* 150, per Littledale, J.; *Dickinson's Q. S.* 6th ed. 409.

(y) Meaning a highway for all manner of things. *R. v. Hatfield, Cas. t. Hard.* 315. A road is not less a *highway* because part of it is *turnpike road*. *Reg. v. Steventon, C. & K.* 55; *Dickinson's Q. S.* 6th ed. 409.

(z) Some day about the commencement of the nuisance; but as to date, see *Wh. Cr. L.* 8th ed. § 1486; *Wh. Cr. Pl. & Pr.* §§ 120-9; *supra*, pp. 13 *et seq.* Only state the *termini*, when they can be readily ascertained, and no doubt can be raised respecting them. The way must be distinctly averred to be within the district sought to be charged with the repair. *R. v. Pendervyn (Inhab.)*, 2 T. R. 513; *R. v. Bishop's Nuckland (Inhab.)*, 1 A. & E. 744; *Dickinson's Q. S.* 6th ed. 409.

(a) *Necessary*. 1 Hawk. c. 32, p. 692; *R. v. Hughes*, 4 C. & P. 373; *Stra.* 686-688; 16 East, 194; 1 Burr. 333; 1 Mod. 107; *R. v. Davey*, 5 Esp. 217; *Dickinson's Q. S.* 6th ed. 409.

(b) *Dickinson's Q. S.* 6th ed. 418.

course,(c) commonly called Trout Beck, leading from a certain place called the corporation dam, in the parish of, etc., in the county of B., to a certain place called the Falls, in the parish of, etc., in the suburbs of the town of B. aforesaid, in the county of B. aforesaid, used by all the people of the said state, for the time being inhabiting and residing in and about the said parishes of and , to supply them with water for the use and benefit of themselves and their families; and that a certain part of the said common and ancient watercourse, in the parish of aforesaid, in the suburbs of the said town of B., in the county of B. aforesaid, containing in length five hundred yards, and in breadth ten feet, on, etc., and continually afterwards until the day of the taking of this inquisition, at, etc., aforesaid, was and still is foul, filled, and choked up with mud, weeds, rubbish, dirt, and other filth, whereby the course and passage of the water, which should and ought and before that time was used and accustomed to run and flow through the same watercourse, was during all the time last aforesaid, and still is, so greatly stopped and obstructed, that the people of the said state inhabiting and residing in and about the said parish of during all the time last aforesaid, were and still are not only deprived of the benefit and advantages of the water, which, during all the time last aforesaid, should and ought to have run and flowed, and still of right ought to run and flow, through the said watercourse, in its usual and accustomed manner, but also the said mud and other filth, during all the time last aforesaid, became and were and still are very offensive and nauseous, and the said water thereby greatly corrupted, and unwholesome to be drunk by man, and by means thereof divers noisome and unwholesome smells did from them arise there, so that the air thereby was and still is greatly corrupted and infected: And that the mayor, baliffs, and commonalty of the said town of B., in the said county of B., for the time being,(d) the said common and ancient watercourse, so as aforesaid being foul, choked, and filled

(c) If a watercourse be stopped, to the nuisance of the county, and *none appear bound by prescription* to clear it, those who have the right of fishing, and the neighboring towns who have the immediate use, may be compelled to remove the obstruction. Hawk. b. 1, c. 75; Dickinson's Q. S. 6th ed. 418.

(d) See the indictment in *R. v. Kingston Corporation*, 6 M. & S. 365, note; Dickinson's Q. S. 6th ed. 419.

up as aforesaid, ought to empty, cleanse, and scour, and until the said grievance have, from the time whereof the memory of man is not to the contrary, emptied, cleansed, and scoured, and have used and been accustomed to empty, cleanse, and scour, and still of right ought to empty, cleanse, and scour, when and as often as the same should or shall be necessary; yet the said mayor, baliffs, and commonalty have not emptied, cleansed, or scoured, nor caused to be emptied, cleansed, or scoured, the said common and ancient watercourse, so being foul, filled, and choked up as aforesaid, as they ought to have done, and still of right ought to do, but during all the time last aforesaid permitted and suffered, and still do permit and suffer, the said watercourse to be foul, filled, and choked up as aforesaid, for want of emptying, cleansing, and scouring the same; to the great damage and common nuisance of all the people of the said state, not only there residing and inhabiting, but also going, returning, passing, and repassing by the same, and against, etc. (*Conclude as in book 1, chapter 3.*)

(785) *Information in New Hampshire against a town for refusing to repair, etc.*

That (*describing the road*) long before the commencement of the nuisance hereinafter mentioned, there was, ever since has been, and still is, a common highway in the town of in said county, used by all the good citizens of said state in and through the same to pass and repass, with their horses, carriages, and teams, at their will and pleasure; and that said highway, so situated in said beginning at (*giving the limits*) (*e*) being rods in width, and in length, was, on, etc., last past, ever since has been, and still is rocky, ratty, broken, uneven, ruinous, and in great decay, in want of due reparation thereof, so that the good citizens of said state, for and during the time aforesaid, could not and still cannot pass and repass in and through the said part of said highway so in decay as aforesaid, as they used, were wont, and ought to do, without great danger of their lives, and loss of their goods; and that the said town of during all the time aforesaid, was and still is

(*e*) These must be proved as laid. State v. Northumberland, 46 N. H. 156; *supra*, p. 355.

by law holden and bound the said part of said highway to repair, whenever the same should or may be necessary ; yet the said town of during all the time last aforesaid, did refuse and neglect, and still doth refuse and neglect, to repair the said highway so in decay as aforesaid, to the great danger and common nuisance of said good citizens, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(786) *Against the inhabitants of a town for not repairing a highway in Massachusetts.(f)*

That on, etc., there was, and from thence hitherto hath been, and still is, a public road and common highway in the town of, etc., leading from in the said town of to in the same town, for all the citizens of said commonwealth, with their horses, teams, carts, and carriages to go, return, pass, repass, ride, and labor, at their free will and pleasure ; and that the aforesaid public road and common highway situated as aforesaid, in the said town of on, etc., was, and from thence until the day of taking of this inquisition, hath been, and still is out of repair, ruinous, miry, broken, and incumbered with rocks and stones, so as to be inconvenient and dangerous to the lives and safety of the citizens of this commonwealth having occasion to pass and repass, ride, and labor upon the public highway and common road aforesaid, with their horses, teams, carts, and carriages ; and that the inhabitants of the said town of in their corporate capacity, are bound and obliged by the laws of this commonwealth to keep and maintain the public road and common way aforesaid in safe, convenient, and complete repair ; yet the said inhabitants, during all the days and times aforesaid, at, etc., aforesaid, have, and still do neglect and refuse to keep the said public road and common highway in such repair ; to the great injury and common nuisance of all the citizens of said commonwealth having occasion to pass, repass, and labor upon

(f) This indictment is taken by Mr. Davis, *Prece.* 197, from 2 Stark. 667, and made conformable to the precedents used in Massachusetts.

The repair of public roads in Massachusetts, says Mr. Davis, *Prece.* 195, is provided for by statute of 1786, ch. 81. If there be bridges or causeways on the road complained of, the fact may be alleged in the indictment thus : " And the several bridges, etc., situated on the same road," etc., are out of repair, etc.

the road aforesaid, with their horses, teams, carts, and carriages; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(787) *Against a supervisor in Pennsylvania for refusing to repair road.*

That long before, and at the commencement of the nuisance hereinafter mentioned, there was, and of right ought to have been, and still of right ought to be, a certain public road and common highway leading from for all the citizens of the said commonwealth to go, return, pass, and repass, ride, and labor, on foot and on horseback, and with their horses, coaches, carts, and carriages in and along the same, at their free will and pleasure; and that a certain part of the said public road and common highway, situate, lying, and being in the township of in the county of Columbia aforesaid, of the length of and of the breadth of feet, and also other parts of the said public road and common highway in the township aforesaid, were on, etc., and from thence until the day of the finding of this inquisition, at the township of aforesaid, have been and still are so decayed for want of opening and repairing the same, that the citizens of the said commonwealth travelling along the said public road and common highway, with their horses, coaches, carts, and carriages, cannot upon the same so safely pass and travel as of right they ought; and that late of, etc., and late of, etc., yeomen,(g) were, on, etc., duly elected by the qualified voters of the township of supervisors of the roads and public highways of the said township, to hold their said office for the term of one year, to wit, at the township aforesaid, at the county aforesaid, and within the jurisdiction of this court; and that the said supervisors as aforesaid, were and are bound and obliged by the laws of the said commonwealth to keep and maintain the public road and common highway aforesaid in safe, convenient, and complete repair; yet the said during all the days and times aforesaid, at township aforesaid, have and still do neglect and refuse to keep the said public road and common highway in such repair, to the great damage and common nuisance, etc.,

(g) Defendants with distinct offices cannot be joined. 2 Hawk. c. 25, s. 89; Wh. Cr. Pl. & Pr. § 303.

and contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(788) *Against a supervisor in Pennsylvania for refusing to open a road, etc.*(h)

That at the county court of general quarter sessions of the peace and gaol delivery, holden at Philadelphia, in and for the county of Philadelphia, before P. F., W. R., and I. H., Esqrs., and their associates, justices of the same court, on, etc., a certain public road leading to Oxford Church, and extending thence over N. and J. D.'s lands to J. F.'s line, thence along the line between the said F.'s and D.'s land to J. W.'s land, thence on the line between the said J. F.'s land and land of J. W. and R. W., to a corner, thence on the line between the lands of the said J. F. and R. W. to a corner stone, thence between the lands of the said J. F. and W. to the line of H. F.'s land on Rock Run, thence crossing the said run over the said H. F.'s land, leaving part of a road before that time laid out on bad ground, to the line of land late S. R.'s, and thence on the line between the said R.'s and F.'s lands, to a road laid out from R. M.'s mill to Germantown, was laid out, etc., and confirmed by the said justices at the same sessions, and the supervisors of the highways of the township and townships through which the said road runs were then and there, by the same justices, at their said sessions, ordered and directed to open and clear the same as by law directed; of which J. S., late of the said county, yeoman, afterwards, to wit, on, etc., then and still being a supervisor of the roads and highways in and for the township of Bristol, in the said county (the said township being one of the townships through which the said road runs), had notice; and the inquest aforesaid, upon their oaths and affirmations, do further present, that the said J. S., the duty of his said office of supervisor of the highways aforesaid, altogether disregarding, and well knowing the same road to be laid out as aforesaid, by the authority aforesaid, from the day and year last aforesaid until the day of the finding of this inquisition, at the township and county aforesaid, hath wholly, unlawfully, and contemptuously neglected and refused to employ laborers to

(h) This count was drawn by Wm. Bradford, Esq., in 1786, then attorney general of Pennsylvania.

open and clear the same road, and hath wholly neglected to take care that the same road should be opened, cleaned, and amended, as by law directed, so that the liege citizens of this commonwealth on and along the same road cannot pass and repass, to the great damage and common nuisance, etc. (*Conclude as in book 1, chapter 3.*)

(789) *Against overseer in North Carolina for refusing to repair road.*

That on, etc., there was, and from thence hitherto there hath been, and still is, a certain common and public highway leading from in the county of towards and unto in the same county, for all the good people of North Carolina to go, return, pass, repass, ride, and labor, with their horses, coaches, carts, and carriages, in and along the same, at their free will and pleasure, and that on the day aforesaid a certain part of the said highway, situate and being in the county of aforesaid, extending from and continuing to in length one hundred yards, and in breadth fifteen feet, was and still is in the county aforesaid very ruinous, miry, deep, broken, and in great decay, for want of due and necessary amendment and reparation of the same, so that the good people of North Carolina, in and along the same highway, with their horses, carts, and carriages, could not during the time aforesaid go, return, pass, ride, and labor, without danger to themselves and the loss of their goods; and that during all that time was overseer of the said highway, and ought as overseer to have repaired and amended the same, but that he unlawfully and negligently refused so to do, to the common nuisance, etc. (*Conclude as in book 1, chapter 3.*)

(790) *Against commissioner in South Carolina for refusing to repair road.*

That on, etc., there was, and from thence hitherto there hath been, and still is, a certain common and public road and highway, leading from towards and unto for all the good citizens of the said state to go, return, pass, and repass, ride, and labor, with their horses, coaches, carts, carriages, and wagons, in and along the same, at their free will and pleasure; and that a certain part of the said common and public road and highway,

situate, lying, and being in the district of aforesaid, extending from and containing in length divers, to wit, and in breadth divers, to wit, feet, on the aforesaid day of in the year last aforesaid, and from thence until the taking of this inquisition, at the place aforesaid, in the district and state aforesaid, was and still is very ruinous, miry, deep, broken, and in great decay and want of repair and amendment, so that the good citizens of the said state, in and along the said public road and highway, with their horses, coaches, carts, carriages, and wagons, could not, during the time aforesaid, nor yet can go, return, pass, and repass, ride, and labor, without great danger of their lives and loss of their goods; and that of, etc., being commissioner of that part of the said common and public road and highway, so being ruinous, miry, deep, broken, and in great decay and want of repair and amendment, as aforesaid, and by law bound to keep the same in good order, repair, and amendment, wholly and continually, from the aforesaid day of in the year last aforesaid, until the taking of this inquisition, at the place aforesaid, in the district and state aforesaid, failed and neglected to repair, amend, and put in good order the same, to the great injury and common nuisance, etc. *(Conclude as in book 1, chapter 3.)*

(791) *Against overseer in Alabama for same.*

That late of, etc., in said county, on, etc., in the county aforesaid, did fail and neglect to keep (*specifying road*), the bridges and causeways therein, within his precinct, clear and in good repair, and did then and there suffer the same to remain uncleared and out of repair for ten days at one time, to wit, between the day of last aforesaid, and the day of in the year of our Lord eighteen hundred and without being hindered by high water, bad weather, or other sufficient cause, contrary, etc., and against, etc. *(Conclude as in book 1, chapter 3.)*

And the grand jurors aforesaid, upon their oath aforesaid, do further present, that the said late of said county, overseer as aforesaid of the road aforesaid, on the day and year last aforesaid, in the county aforesaid, did fail and neglect to set up neat

and permanent mile-posts at the end of each mile, in continuation on that part of the said road within his precinct, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

VIOLATIONS OF LICENSE LAWS.(i)

(792) *Presuming to be a common seller of wine, under the Maine statute.*(j)

That B. S., of, etc., on, etc., and on divers other days since that time and up to the present time, at Bath aforesaid, did take upon himself and presume to be a common seller of wine, brandy, rum, and strong liquors by retail, and in less quantity than twenty-eight gallons, at one and the same time delivered and carried away, illegally and without license therefor,(k) and did then and

(i) See generally Wh. Cr. L. 8th ed. §§ 1498 *et seq.*

(j) *State v. Stinson*, 17 Me. 155.

"The statute of 1835, ch. 193," said Weston, C. J., "having provided that the penalties incurred under the act of 1834, ch. 141, to which that was additional, might be recovered by indictment, it is necessarily implied that it must be in the name of the state. What penalty or forfeiture is incurred, and to what uses applied, depends on the law, and need not be set forth in the indictment. There is but one offence charged against the defendant, and that is, his being a common retailer without license. This, it is expressly averred, he did take it upon himself to be. In order to avoid unnecessary prolixity, general averments of divers the finding of the indictment, have been received as a sufficient specification of the offence, which consists in being a common retailer without license."

See also *State v. Cottle*, 15 Me. 473.

(k) That license should be negated in the indictment, see Wh. Cr. L. 8th ed. § 1499.

It has been said in England, that a statute casting on the defendant the burden of proving a license does not, by itself, relieve the prosecution from averring the want of license (*R. v. Harvey*, L. R. 1 C. C. 284), though otherwise in Massachusetts. *Com. v. Edwards*, 12 Cush. 187.

That the indictment, as a general rule, should negative the license, see *State v. Munger*, 15 Vt. 290; *Com. v. Thurlow*, 24 Pick. 374; *State v. Webster*, 5 Halst. 293; *Com. v. Hampton*, 3 Grat. 590; *State v. Horan*, 25 Tex. (Sup.) 271; *Com. v. Smith*, 6 Bush. 303; *Burke v. State*, 52 Ind. 461. Indictment need not aver defendant not to be a "druggist," etc. *Surratt v. State*, 45 Miss. 601; *Riley v. State*, 43 Miss. 397. See also *State v. Fuller*, 33 N. H. 259; *State v. Blaisdell*, 33 Ibid. 388; *State v. Buford*, 10 Mo. 703. As the cases show, the whole question depends on the principle underlying the statute. Where one section of the statute imposes a penalty on selling "in violation of the provisions of this act," it has been held unnecessary to negative exceptions in subsequent sections. *Com. v. Tuttle*, 12 Cush. 502; *Com. v. Hill*, 5 Grat. 682.

In Texas, a statute providing that license need not be negated has been pronounced unconstitutional. *Hewitt v. State*, 125 Tex. 722; *State v. Horan*, 25 Tex. (Sup.) 271; *contra*, *State v. Comstock*, 27 Vt. 553. And in Maine a statute has been held unconstitutional which prescribes that the vendee need not be named. *State v. Learned*, 47 Me. 426.

"Without" implies a sufficient negation. *Com. v. Thompson*, 2 Allen. 507. "Without lawful excuse" is equivalent to without authority. *R. v. Harvey*, L.

there as aforesaid, sell and cause to be sold to divers persons to the jurors unknown,^(l) divers quantities of said strong liquors, in less quantity than twenty-eight gallons by retail as aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(793) *Selling liquors by retail in New Hampshire.*

That A. B., of, etc., on, etc., at, etc., not being then and there a licensed taverner or retailer, did then and there unlawfully sell (*stating the measure*) of spirituous liquors,^(m) to wit (*stating liquors*), to one (*stating the vendee*), contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

R. 1 C. C. 284. If the negation of the license to sell is as to quantity coextensive with the quantity charged to be sold, it is sufficient. The general negation, "not having a license to sell liquors as aforesaid," relates to the time of sale and not to the time of finding of the bill, and will suffice. *State v. Munger*, 15 Vt. 290. "Without being duly authorized and appointed thereto according to law," is a sufficient negation. *Com. v. Keefe*, 7 Gray, 332; *Com. v. Conant*, 6 Gray, 482; *State v. Fanning*, 38 Mo. 359; *Com. v. Hover*, 125 Mass. 209; *Roberson v. Lambertville*, 38 N. J. L. 69. See *State v. Hornbreak*, 15 Mo. 478; *State v. Andrews*, 28 Mo. 17. As to mode of negating see *Eagan v. State*, 53 Ind. 162.

(l) The prevalent opinion is, that it is not necessary to name the vendee. *State v. Munger*, 15 Vt. 290; *People v. Adams*, 17 Wend. 475; *Osgood v. People*, 39 N. Y. 449; *State v. Webster*, 5 Halst. 293; *Com. v. Smith*, 1 Grat. 553; *Morrison v. Com.*, 7 Dana, 219; *State v. Kuhn*, 24 La. An. 474; *State v. Muse*, 4 Dev. & B. 319; *State v. Becker*, 20 Iowa, 438; *State v. Baughman*, Ib. 497; *Cochran v. State*, 26 Texas, 698; *State v. Heldt*, 41 Tex. 220; *State v. Fanning*, 38 Mo. 359; *State v. Jacques*, 68 Mo. 260; *Rice v. People*, 38 Ill. 435. See other cases Wh. Cr. L. 8th ed. § 1510. On the other hand, in some states, and with strong technical reason, it is requisite to name the vendee or to aver that he was unknown. *Com. v. Thurlow*, 24 Pick. 374; *State v. Doyle*, 11 R. I. 574; *State v. Steedman*, 8 Rich. 312; *Wreidt v. State*, 48 Ind. 579; *Wilson v. Com.*, 14 Bush. 159; *Dorman v. State*, 34 Ala. 216; *Capritz v. State*, 1 Md. 569; *State v. Walker*, 3 Harring. 547.

(m) When the statute makes the sale of "intoxicating" or "spirituous" liquor indictable, then it is enough so to describe the drink sold. Wh. Cr. L. 8th ed. § 1513. It is otherwise when the statute specifies the particular kinds of intoxicating drinks, in which case the drink must be specified. *State v. Munger*, 15 Vt. 290; *State v. Fox*, 1 Harrison, 152.

When the statute makes selling "at a less measure than a quart" indictable, such a sale must be averred. It is not enough to say "a pint." *Com. v. Adlin*, 23 Pick. 275; *State v. Shaw*, 2 Dev. 198.

"Sell and offer to sell" is not duplicity. *Barnes v. State*, 20 Com. 232; *supra*, vol. i. p. 25.

The price need not be averred, see Wh. Cr. L. 8th ed. § 1516, for cases.

(794) *Dealing in liquor, etc., without license, under § 1, chapter 83, Vermont Rev. Sts.(n)*

That the respondents, on, etc., not having a license, etc., did deal in the selling of domestic distilled spirituous liquors in a less quantity at one time than twenty gallons, and did then and there sell to one J. G. one pint of alcohol, being domestic distilled spirituous liquor, etc.

(795) *Selling liquor by the small under same.(o)*

That C. A. M., of, etc., on, etc., at, etc., did sell and dispose of, at his, the said C. A. M.'s store in Rutland aforesaid, one gill of

(n) *State v. Chandler and Keys*, 15 Vt. 425.

Hubbard, J.—“Section first of chapter 83 of the revised statutes makes it unlawful for any person to sell any spirituous liquors in a less quantity than twenty gallons, without a license. The 14th section of the same chapter provides, that any person who shall deal in the selling of foreign or domestic distilled spirituous liquors in a less quantity than twenty gallons at one time, shall be deemed to be a retailer within the meaning of this chapter. The chapter is entitled, Of licenses to retailers, innkeepers, and victualling houses. The first section of the chapter defines the act that is unlawful if done without a license, and that is, to sell any foreign or domestic distilled spirituous liquors. This being the act that is forbidden to be done, of course for the doing of this the penalty is incurred. It is not any succession of acts of a similar character that constitutes the offence. The 14th section defines who are retailers, and by dealing in the selling the same is meant in the first section by the expression to sell. But there is another view of the case still more decisive. The 26th section of the same chapter provides that if any person shall be guilty of more than one distinct offence prohibited in either of the three preceding sections, he may be prosecuted and subjected to the penalties for all such distinct offences at the same time. There would be a difficulty in understanding when a distinct offence had been committed, or how many had been committed, if it required any number or succession of acts of selling to constitute a distinct offence. The result, therefore, must be that the offence is manifest by the proof of a single act of selling.”

(o) *State v. Munger*, 15 Vt. 290. In this case it was ruled:—

1st. That in an indictment against a person for selling spirituous liquors by the small measure without a license, it is not necessary that it should be averred to whom they were sold, or the number of the persons.

2d. That an averment that the respondent sold rum, brandy, and gin, is sufficient, without an averment that they were spirituous liquors.

3d. That the negation of license must be broad enough to cover all the sources from which it might have been obtained.

4th. That if the negation of license to sell is, as to quantity, coextensive with the quantity charged to be sold, it is sufficient.

5th. That the general negation “not having a license to sell said liquors as aforesaid,” relates to the time of sale, and not to the time of finding of the bill, and is sufficient.

6th. It is not necessary that the offence of selling spirituous liquors without license should be charged to have been committed with force and arms. Where a distinct sale of spirituous liquors is alleged to have been made on a day cer-

rum, one gill of brandy, and one gill of gin, to divers persons, he the said C. A. M. not having a license to sell said liquors as aforesaid, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said C. A. M., not having a license to sell rum, brandy, or gin by the half gill, gill, or half pint, did, on, etc., and at divers other times between the day last aforesaid and the time of this presentment, sell rum, brandy, and gin by the gill, half gill, and half pint at his the said C. A. M.'s store, in Rutland aforesaid, to divers citizens of this state, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(796) *Selling liquor, etc., under Massachusetts Rev. Sts.*
ch. 47, § 1.(p)

That C. L., etc., at, etc., on, (q) etc., and from thence continually to the day of the making of this presentment, did presume to be, and during all the time aforesaid was, in the dwelling-house of the said C. L. there situate, by her the said C. L. then and there used, improved, and occupied, a seller of rum, brandy, gin, and other spirituous liquors, to be then and there, in the said

tain, the count is not vitiated by adding an averment of sales at divers times between that and the finding of the bill, but the averment may be regarded as surplusage.

7th. That the respondent being one of the firm, and having made out a bill of the sale of goods at sundry times in his own handwriting, upon which was entered the sale of spirituous liquors by the small measure at different times, and which had been receipted by him, such bill of sale was competent evidence to go to the jury to prove a sale, and the person to whom the sale was made need not be produced.

(p) *Com. v. Leonard*, 8 Mete. 529. Dewey, J.—“This indictment may be sustained, although it does not charge, in direct terms, that the defendant was a common seller of rum, brandy, gin, and other spirituous liquors. The statute itself (*Rev. Sts. ch. 47, § 1*) does not use the words ‘common seller,’ but the legal construction given to the statute has always been, that, in punishing the offence therein described, the legislature intended to punish the offence of being a common seller of rum, brandy, etc.” *Com. v. Odlin*, 23 Pick. 275; *Com. v. Pearson*, 3 Mete. 449. In the present case the form of the indictment, charging that the defendant, ‘on the first day of May now last past, and from that day to the day of making this presentment, did presume to be, and during all the time aforesaid was a seller of rum, brandy, etc.,’ does substantially charge the offence of being a common seller of rum, brandy, etc.”

(q) Where the offence is laid as in the text, with a *continuando*, no evidence can be received of sales prior to the date first laid. *Com. v. Briggs*, 11 Mete. 573.

dwelling-house of her the said C. L., used, consumed, and drank by the purchasers thereof; she the said C. L. not being then and there duly licensed according to law^(r) to be an innholder or common victualler, against, etc. (*Conclude as in book 1, chapter 3.*)

(797) *Another form under same section.(s)*

The jurors, etc., do present, that, late of, etc., without any authority or license therefor duly had and obtained according to law, did presume to be, and was a common seller^(t) of wine, brandy, rum, and other spirituous liquors (to be used in and about the shop of him the said the said shop being a building of said),^(u) against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(798) *Under Rev. Sts. ch. 47, § 2.(v)*

That A. B. and C. D., on, etc., at, etc., did sell to one E. T. R. one gill of spirituous liquor, to be used in and about their house there situate, without being first duly licensed according to law,^(w) as innholders or common victuallers, with authority to sell spirituous liquor, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(799) *Another form under § 3.(x)*

That A. B., etc., on, etc., at, etc., did sell to one W. B., spirituous liquor in less quantity than twenty-eight gallons, she, the

(r) "Not being then and there duly appointed and authorized therefor," is sufficient under stat. of 1855, ch. 215. *Com. v. Roland*, 12 Gray, 132.

(s) See *Com. v. Odlin*, 23 Pick. 275; *Com. v. Pearson*, 3 Metc. 449; and *Com. v. Tower*, 8 Metc. 527; where this form is sustained. Two defendants, it seems, may be joined in the same indictment; nor is it an objection that the offence is averred to be on a certain day, "and divers others times and days between that day and the taking of this inquisition." *Com. v. Tower*, 8 Metc. 527.

(t) See *Com. v. Wood*, 4 Gray, 11.

(u) Passage in brackets may be omitted. *Com. v. Jones*, 7 Gray, 415.

(v) Held good in *Com. v. White* and another, 10 Metc. 14.

(w) An indictment for unlawfully selling intoxicating liquors, "not being then and there duly appointed and authorized therefor," sufficiently excludes all modes of selling allowed by stat. of 1855, ch. 215. *Com. v. Roland*, 12 Gray (Mass.) 132.

(x) *Com. v. Leonard*, 3 Metc. 530.

Dewey, J.—"This complaint may be supported under the third section of ch. 47 of the revised statutes. It does not indeed allege that the spirituous liquor, sold

said A. B., not being duly licensed therefor, against, etc. (*Conclude as in book 1, chapter 3.*)

(800) *Under Rev. Sts. ch. 47, § 2.(y)*

That S. C., at, etc., on, etc., did sell to one A. B. one glass of brandy, to be by him the said A. B. then and there used, consumed, and drank in the dwelling-house of said S. C. there situate, he, the said S. C., not being then and there duly licensed according to law to be an innholder or common victualler; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(801) *Another form under same.(z)*

That S. C., etc., on, etc., at, etc., being duly licensed as an innholder, with authority only to sell wine, beer, ale, cider, and other fermented liquors, did, in violation of law, without any authority or license therefor duly had and obtained according to law, sell to one A. B. one glass of brandy, to be by him, the said A. B., then and there used, consumed, and drank in the

by the defendant to William Beck, was not delivered and carried away all at one time; but that is immaterial, where the quantity sold was less than twenty-eight gallons. The sale of less than twenty-eight gallons constitutes an offence within that section. If the amount sold had exceeded twenty-eight gallons, then the offence would not be correctly charged, unless there were added the further allegation, that the same was not delivered and carried away all at one time."

(y) This form was sustained in *Com. v. Churchill*, 2 Mete. 119-125, under Rev. Sts. ch. 47, § 2, which was revived by stat. of 1840, ch. 1. The court declined deciding, however, whether the indictment would have been defeated by the production by the defendant of a license to sell wine, beer, ale, etc., though not to sell brandy, rum, or other spirituous liquor. Subsequently, however, it was held that when such a license was granted, the above indictment could not be sustained, and a form was suggested by the court as being the proper one in such cases, and which is given in the text. *Com. v. Thayer*, 5 Mete. 246.

(z) See last note, and further, *Com. v. Thayer*, 5 Mete. 246. In a subsequent complaint against same defendant (*Com. v. Thayer*, 8 Mete. 523), it was said that the qualified license of the defendant was to be thus pleaded, "he the said defendant not being then and there duly licensed, according to law, to be an innholder and common victualler, with authority to sell wine, brandy, rum, and other spirituous liquors." "It was suggested," says Dewey, J., "that the case of *Com. v. Thayer* (5 Mete. 246) seems to require, that, in cases like the present, the indictment or complaint should set forth specially that the defendant was licensed as an innholder with authority to sell only wine and beer, etc. But that form of allegation was only stated as one mode of avoiding the objection which arose in that case, where the question was upon an indictment alleging that the defendant 'was not duly licensed as an innholder.' Such objection does not arise here, as the allegation in the complaint does negative the license to all spirituous liquors." See further, *Com. v. Stowell*, 9 Met. 572.

dwelling-house of said S. C. there situate ; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(802) *Another form under same.*

That A. B., of said Boston, yeoman, on, etc., at, etc., without being duly licensed therefor as an innholder or common victualler according to the provisions of law and the provisions of the forty-seventh chapter of the revised statutes of said commonwealth, did then and there sell a certain quantity, to wit, half of a gill of spirituous liquor, to a certain person whose name is C. D., to be used and drank in and about his the said A. B.'s building, salesroom, and place of business used as a shop, there situate, against, etc. (*Conclude as in book 1, chapter 3.*)

(803) *Another form, under Rev. Sts. ch. 47, § 2, where defendant is licensed to sell wine, etc.(a)*

That A. C. S., etc., on, etc., at, etc., did sell to one A. B. a half gill of spirituous liquor, to be by him the said A. B. then and there used about the dwelling-house of the said A. C. S. there situate, he the said A. C. S. not being first duly licensed according to law as an innholder or common victualler, with authority to sell spirituous liquors, against, etc. (*Conclude as in book 1, chapter 3.*)

(804) *Another form in Massachusetts.(b)*

That A. B., etc., at, etc., on, etc., “did presume to be a seller of wine, brandy, rum, and other spirituous liquors, to be used in

(a) In *Com. v. Thayer* (8 Mete. 523), as was just said, a form similar to this was sanctioned, and in *Com. v. Howell* (9 Mete. 571), a motion in arrest of judgment against an indictment in which the license was pleaded as it is in the text, was discharged.

(b) *Com. v. Stowell*, 9 Mete. 569. Each of the other counts omitted the allegation that the defendant presumed to be a seller of wine, brandy, etc., without being first licensed as an innholder, etc., and alleged a sale to an individual, in the form adopted in the latter part of the first count.

Dewey, J.—“1. It is objected to the first count in the indictment, that it is bad for duplicity. The argument of the counsel for the defendant assumes that it charges two distinct offences, arising under different sections, viz., §§ 1 and 2 of ch. 47 of the Rev. Sts. The answer to this objection is, that no offence is charged upon the first section. That offence is that of being a common seller of brandy, rum, etc.; and a proper indictment upon this section, for the offence of selling spirituous liquors, should contain the allegation that the party was such common seller. It is not indeed absolutely necessary to use the word

and about his dwelling then and there situate, without being first licensed according to law, as an innholder or common victualler, with authority to sell spirituous liquors; and did then and there sell to one T. L. C. one half gill of spirituous liquor, to be used in and about his dwelling-house then and there situate, without being first duly licensed according to law, as an innholder or common victualler, with authority to sell spirituous liquors, against, etc. (*Conclude as in book 1, chapter 3.*)

(805) *Another form in Massachusetts.(c)*

That A. B., at, etc., on, etc., did sell to one one glass of brandy, to be by him the said then and there used, consumed, and drank in the dwelling-house there situate of him the

'common,' as prefixed to seller, if other equivalent words are introduced, as was held in *Com. v. Leonard* (8 Metc. 529), where the allegation in the indictment, that the defendant, from a certain day stated, on divers days and times to the time of finding the indictment, was a seller of spirituous liquors, etc., was held sufficiently to set forth the offence under the first section. But it seems to us that a mere allegation that the defendant, on a certain day named, was a seller, etc., is not sufficient to charge the offence of being a common seller. There is, therefore, no offence charged in this indictment, upon the first section of the statute."

"3. It is next insisted, that the indictment is bad, because it does not allege that the liquor was used in the house of the defendant, but on the contrary, that it alleges the use of the same to have been in the house of Thomas L. Clark, the purchaser. By a strict grammatical construction, the allegation, 'did then and there sell to one Thomas L. Clark, one half gill of spirituous liquor, to be used in and about his house then and there situate, without being first duly licensed,' etc., would authorize the words 'his house' to be taken to refer to the house of Clark, the vendee. But we do not feel bound to this very strict grammatical reading of this clause in the indictment.

"We may resort to the entire language of the whole paragraph; and if the charge be plainly indicated, and so set forth as to leave no real uncertainty as to the nature of it, it may be held good. See 21 Pick. 521. Looking at the whole count, we think it sufficiently alleges the use of the liquor in the house of the defendant.

"4. The remaining inquiry is, whether there be any proper allegation that the defendant was not duly licensed as an innholder or common victualler. So far as there is any question of uncertainty as to the person alleged not to be licensed, the views already presented on the preceding point apply, and fully meet this objection.

"The other specification of objection under this head, viz., that the form of the allegation should have been, that the defendant was licensed as an innholder, but with the right of vending only ale, beer, etc., as was suggested in *Com. v. Thayer* (5 Metc. 247), is answered by the decision in *Com. v. Thayer* (8 Metc. 523), where other equivalent words were held to be sufficient, and an allegation very similar to the present was decided to be good.

"All the objections, upon which the motion in arrest of judgment has been argued, are overruled."

(c) This count was sustained in *Com. v. Churchill*, 2 Metc. 118, 119.

said S., he the said S. not being then and there duly licensed according to law to be an innholder or common victualler; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(806) *Another form in Massachusetts.(d)*

That R. T. and C. L., both of, etc., at, etc., on, etc., and on divers other days and times between that day and the day of taking this inquisition, did presume to be, and were common sellers of wine, brandy, rum, and other spirituous liquor, to be used and drank in the dwelling-house of them the said R. and C. there situate, and by them the said R. and C. then and there actually used and occupied, without being first duly licensed therefor according to law, against, etc. (*Conclude as in book 1, chapter 3.*)

(d) *Com. v. Tower*, 8 Mete. 527. The defendants moved that judgment be arrested from the insufficiency of the indictment.

Dewey, J.—“1. It is no valid objection to this indictment, that it includes two persons. The acts therein charged, as constituting the offence, may well be done by two or more jointly; and whenever several may join in the offence, they may properly be united in the same indictment.

“2. The objection that this indictment is bad because it avers the offence to have been committed ‘on the first day of May last past, and on divers other days and times between that day and the day of taking this inquisition, cannot avail. It is no objection that such continuous change is made, and it accords with the forms usually adopted. Such was the case in *Com. v. Odlin* (23 Pick. 275), and it seems well adapted to the description of the offence.

“3. It is then contended that the negative averment required to constitute a good indictment for the offence, viz., the allegation that the party was not duly licensed to make such sale, was not properly set forth in this indictment. The argument assumes that the allegation, ‘without being first duly licensed therefor,’ must by strict grammatical rules apply to the next antecedent sentence, and therefore qualifies the allegation that the defendants occupied a certain dwelling-house, and does not negative their authority to sell spirituous liquor. This is a reading of the indictment which we cannot sanction. The dwelling-house is introduced as the place where the liquor was used, and the averment, ‘without being first duly licensed therefor,’ clearly refers to the sale of the liquors, and not to the place where they are used. See *The State v. Jernigan*, 8 Murph. 19.

“4. It is then said, that if this negative averment be not insufficient for the reasons last stated, it is defective, inasmuch as it only negatives a joint license to the two, and this would be true, although one of the defendants had been duly licensed. Now, it seems quite clear that this is only a formal objection; as upon proof of a license to either of the defendants, such license would constitute, as to that defendant, a good defence to this indictment. Further, we think that, although it would have been more technically correct to have alleged that the defendants had not, nor either of them, any license to sell spirituous liquors, yet the allegation, in its present form, may well be taken to apply to both, and that individually and severally, as well as jointly.”

(807) *Selling liquor without license, under Mass. Rev. Sts.
ch. 47, § 3.(e)*

That, etc., on, etc., at, etc., without any authority or license therefor duly had and obtained according to law, did presume to be, and was a retailer of spirituous liquors in less quantity than twenty-eight gallons, and that delivered and carried away all at one time, and did then and there sell and retail two quarts of spirituous liquor to L. J., against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(808) *Another form under same.(f)*

That A. B., on, etc., at, etc., and there on divers other days and times between the first day of January last and the first Monday of May, did presume to be and was a retailer and seller of wine, rum, brandy, and other spirituous liquor in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time; he the said B. then and there not being

(e) See *Goodhue v. Com.*, 5 Metc. 553, where this form was held good. In *Com. v. Kimball* (7 Metc. 304), an indictment under the same section, without any averment of the sale of a specific quantity to A. B., but with the charge inserted, "did presume to be and was a retailer to one A. B. of spirituous liquors," etc., was somewhat querulously sustained, it being said, "the expression is not one which is the best adapted to state this offence with the greatest precision and clearness, nor is it according to approved forms. It is not, however, such a defect as requires us to quash the indictment as insufficient." Afterwards, in *Com. v. Simpson* (9 Metc. 138), it was determined that when the first segment of the indictment, charging the defendant with being a retailer of spirituous liquors, etc., was badly pleaded, it might be stricken out as surplusage, and judgment entered upon the averment of a single illegal sale contained in the latter branch of the count. See also *Com. v. Pray*, 13 Pick. 359; *Com. v. Odlin*, 23 Pick. 275.

(f) *Com. v. Bryden*, 9 Metc. 137.

The defendant, after *nolo contendere* entered, moved in arrest of judgment, because the indictment did not charge the time when he sold spirituous liquor in a less quantity than twenty-eight gallons, etc., with the certainty and precision required by law, so as to enable the court to render judgment of guilty, or so as to apprise him of the precise offence of which he stood charged, and enable him to prepare for his defence. This motion was overruled by the municipal court, and the defendant thereon alleged exceptions.

Dewey, J.—"Enough is set forth in the indictment to constitute the offence of a single act of selling spirituous liquor without being duly licensed, if we strike out all that part which charges generally that the defendant, 'on divers days and times between the first day of January and the first Monday of May, was a retailer and seller of wine, rum, brandy, and other spirituous liquors.' This, we think, may be stricken out, upon the authority of *Com. v. Pray*, 13 Pick. 359, and the *People v. Adams*, 17 Wend. 465."

Exceptions overruled.

duly first licensed as a retailer of wine and spirits, as is provided by law and in the forty-seventh chapter of the revised statutes of said commonwealth ; and he did then and there sell and retail spirituous liquor to a person whose name is J. C., in a certain quantity less than twenty-eight gallons, and that delivered and carried away at one time, to wit, in the quantity of half a pint, against, etc. (*Conclude as in book 1, chapter 3.*)

(809) *Another form under same.*

That A. B., of, etc., on, etc., at, etc., and there on divers other days and times between the first day of last and the said first Monday of did presume to be and was a retailer and seller of wine, brandy, rum, and other spirituous liquors in a less quantity than twenty-eight gallons, and that delivered and carried away all at one time ; he the said then and there not being duly first licensed as a retailer of wine and spirits, as is provided by law and in the forty-seventh chapter of the revised statutes of said commonwealth ; and he did then and there sell and retail wine and spirituous liquors to a person and to persons whose names to said jurors are not yet known, in a certain quantity less than twenty-eight gallons, and that delivered and carried away at one time, against, etc. (*Conclude as in book 1, chapter 3.*)

[*For a form under stat. of 1855, ch. 405, prohibiting the keeping of a building for the sale of intoxicating liquors, etc., not in the original package, etc., and without license, etc., see Com. v. Quinn, 12 Gray, 178.*]

(810) *Violation of license laws in Rhode Island.*

That A. B., of Warren, in the aforesaid county of Bristol, trader, alias grocer, alias merchant, between the first day of June, in the year of our Lord one thousand eight hundred and forty-five, and the tenth day of November, in the year of our Lord one thousand eight hundred and forty-five, and within the said times, with force and arms, at Warren aforesaid, in the aforesaid county of Bristol, did sell in the possessions of him the said A. B., to wit, in a certain shop, situate in the town of Warren, in the aforesaid county of Bristol, strong liquor, to

wit, rum, by retail in a less quantity than ten gallons, without license first had and obtained from the town council of the said town of Warren, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

And the jurors aforesaid, upon their oaths aforesaid, do further present, that the said A. B., between the said first day of June, in the year of our Lord one thousand eight hundred and forty-five, and the said tenth day of November, in the year of our Lord one thousand eight hundred and forty-five, on divers Sundays within said last mentioned times, with force and arms, at Warren aforesaid, in the aforesaid county of Bristol, did sell, and suffer to be sold, in his possessions there situate, ale, wine, and strong liquors by retail in a less quantity than ten gallons, without license first had and obtained from the town council of the said town of Warren, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(811) *Same in New York.(g)*

That J. A., at, etc., on, etc., and on divers other days and times between that day and the day of the finding of this indictment, to wit, etc., did sell by retail to divers citizens of this state, and to divers persons to the jurors aforesaid unknown, and did deliver in pursuance of sale to the said divers citizens, and the said divers persons to the jurors aforesaid unknown, strong and spirituous liquors and wines, to wit, three gills of brandy, three gills of rum, three gills of gin, three gills of whiskey, three gills of cordial, three gills of bitters, three gills of wine, to be drank in the house, store, shop, and grocery of the said J. A., in the city of Utica aforesaid, without having obtained a license therefor as a tavern-keeper, and without being in any other way authorized, against, etc. (*Conclude as in book 1, chapter 3.*)

(812) *Same in New Jersey.*

That A. B., late of, etc., on, etc., at, etc., unlawfully did sell by retail, and cause and knowingly permit to be sold to C. D., certain ardent spirits, the said ardent spirits then and there not

(g) This form is found in *People v. Adams*, 17 Wend. 475. The *continuando* and the superfluous allegations of rum, etc., which the proof does not hit, may be discharged as surplusage.

having been compounded and intended to be used as medicine, by less measure than one quart, to wit, one without license for that purpose first had and obtained in the manner prescribed by the statutes in that case made and provided, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That the said A. B., on, etc., at, etc., unlawfully did sell, and cause and knowingly permit to be sold to the said C. D., a certain composition, of which ardent spirits did then and there form the chief ingredient, the said composition then and there not having been compounded and intended to be used as medicine, by less measure than one quart, to wit, one without license for that purpose first had and obtained in the manner prescribed by the statutes in that case made and provided, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That the said A. B., on, etc., at, etc., unlawfully did sell, and cause and knowingly permit to be sold to the said C. D., certain mixed liquors, the said mixed liquors then and there being ardent spirits, by less measure than five gallons, to wit, without license for that purpose first had and obtained in the manner prescribed by the statutes in that case made and provided, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(813) *Same in Pennsylvania.*(h)

That J. B., late of, etc., on, etc., and on divers other days and times, as well before as afterwards, at, etc., did keep a tip-

(h) *Com. v. Baird*, 4 S. & R. 141.

Duncan, J.—“The motion in arrest of judgment will be first disposed of, in doing which it will be proper to consider the various legislative provisions on this subject. The act of 1710 (1 Smith’s Laws, 73) provides that no person, without license from the justices, shall keep a public house of entertainment, tippling-house, or dram shop, under the penalty of five pounds, one-half thereof to the governor, and the other half to the use of the poor of the city or township where the offence shall have been committed. By a supplement to this act, passed 26th August, 1721 (1 Smith’s Laws, 127), it is enacted, that no person not qualified as by the above recited act shall presume to sell, or barter with or deliver, any wine, rum, etc., which shall be used or drank in their houses, yards, or sheds, or shall be so used or drank in any shelter, place, or wood, near or adjacent to them, with their privacy or consent, by any companies of negroes, servants, or others, or retail or sell to any person or persons whatsoever any rum, brandy, or other spirits, by less quantity or measure than one quart, nor

pling-house, without any license so to do first had and obtained according to law, and then and there without such license, com-

any wine, by any less measure or quantity than one gallon, nor any beer, ale, or cider, by any less quantity than two gallons, and the same liquors respectively, delivered to one person and at one time, under the same penalty as is prescribed by the act of 1710. By the act of 19th March, 1783 (3 Smith's Laws, 65), it is provided, that if any person or persons shall hereafter retail and sell less than one quart of rum, wine, brandy, or other spirits, to be delivered at one time to one person, without having first obtained a license agreeably to law for that purpose, he or they shall forfeit and pay for every such offence the penalty of ten pounds.

"The most solid objection to this indictment is the omission to state that the liquor was delivered at one time and to one person; and I own that if this were *res integra*, it would be difficult to answer. But it will be observed, that the same words are used in the act of 1721; 'and the same liquors respectively delivered to one person and at one time;' and in the act of 1783, 'shall sell or retail less than one quart, and to be delivered at one time and to one person.' The only alteration in the act of 1817 is, that in the city and county of Philadelphia the offence is to consist of selling less than one pint, instead of one quart, the penalty is increased, and in the distribution of the penalty. Keeping a tippling-house is still an offence. Keeping a tippling-house in the city and county of Philadelphia, the overt act being the retailing of liquor by less measure than one pint, is punishable under this statute. This form of indictment having prevailed for eighty years, been adopted by successive attorney-generals, the provisions of the several acts being nearly if not altogether in the same words, the court will not say that all the prosecutions during that long period of time are erroneous; for it is admitted that this has been the only form. A continued and contemporaneous practice under a statute, in a matter merely formal, ought not lightly to be disturbed. The court have less difficulty in deciding the remaining points. The only remedy is by indictment. The keeping a tippling-house is an indictable offence. The general prohibition, under penalty, to sell liquors by less measure than one quart would, it is admitted, render the act indictable, unless some particular mode of recovering the penalty is prescribed; and the remedy by action is inferred from the use of the words 'costs of suit,' in the second section. This appears a forced inference, not warranted by a just construction of the whole act; for how in a *qui tam* action could the court sentence the offender, if convicted, to pay the penalty, or to the penitentiary house, to be kept at hard labor? As to the offence being laid in the city, if it could not be so laid, it would follow, that where the retailing was in the county it would be exempted from punishment; for though the city might be in the county, the county could not be in the city. The city and county are to be construed disjunctively. Such is the manifest declaration of the legislature; for in the distribution of the penalty, one half is to enure to the guardians of the poor of the township or district where the offence shall occur. Any other construction would render the act insensible and void; nor is there any such inflexible rule in the construction of penal statutes, that you must abide by the very letter; for in the construction of penal statutes the strict meaning of the expressions has been departed from, in order to comply with the manifest spirit and intention of the law. 1 Binn. 277. Nor does regard to criminals require such construction of the words perhaps not absolutely clear, as would tend to destroy and evade the very intention and meaning of the act. It is not unfrequent in the construction of statutes to take the disjunctive as a copulative and the copulative as a disjunctive, in order to make the words stand with reason and the intent of the framers of the law. Plow. 206; 6 Cranch, 7. They are so to be considered here. An act declaring that a particular act

monly and publicly did sell and utter, and cause to be sold and uttered, to sundry persons divers quantities of rum, brandy, and whiskey, and other spirituous liquors, by less measure than one pint, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(814) *Another form for same, being that used in Philadelphia.*

That A. B., late of, etc., on, etc., at, etc., did sell and retail, and cause to be sold and retailed, less than one quart of rum, wine, brandy, and other spirituous or vinous liquors, then and there delivered at one time and to one person, and to more than one person, without having first obtained license agreeably to law for that purpose, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(815) *Same in Virginia.(i)*

That W. T., late of, etc., on, etc., unlawfully, and without then having a license therefor according to law, at the store of said W. T., in the county of Wood, and within the jurisdiction of the county court of said county, did sell by retail, whiskey, brandy, and other liquors to the jurors unknown, and mixtures thereof, to J. N., to be drank at the said place where sold as aforesaid, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(816) *Same in North Carolina.*

That A. B., late of, etc., at, etc., on, etc., and on other days both before and since that day up to the taking of this inquisition, unlawfully and wilfully did sell and retail to one C. D., and to other persons to the jurors unknown, a quantity of spirituous liquors by the small measure, viz., by a measure less than one quart, he the said A. B. having there and then no license so to sell and retail, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

committed in the counties of Philadelphia and Bucks, should be punished in a certain manner, necessarily means in either county, for it could not be committed in both; it describes a certain district consisting of two counties; if not so considered, the offence never could be committed; it could not be committed in both counties."

(i) See *Tefft v. Com.*, 8 Leigh, 721.

(817) *Same in Alabama.*

That A. B., late of, etc., on, etc., in the county aforesaid, did sell spirituous liquors, to wit, rum, brandy, and whiskey, in less quantity than one quart, without license, to one C. D., and to divers other persons whose names are to the jurors aforesaid unknown, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

And the jurors aforesaid, upon their oath aforesaid, do further present, that said A. B., on the day and year aforesaid, in the county aforesaid, did sell ardent spirits, to wit, rum, brandy, and whiskey, in quantities of one quart, by the quart, without license, to one C. D., and to divers other persons whose names are to the jurors aforesaid unknown; and that the said rum, brandy, and whiskey was then and there drank and consumed on the premises of him the said A. B., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(818) *Same in Kentucky.*(j)

That A. B., etc., on, etc., at, etc., did keep a tippling-house, by then and there selling, by the small and by retail in said tippling-house, divers quantities of spirituous liquors, to wit, whiskey, brandy, rum, gin, wine, etc., to divers persons to the jurors un-

(j) *Overshine v. Com.*, 2 B. Mon. 344.

"The indictment," said the court, "with sufficient certainty, charges those acts which constitute keeping a tippling-house. It not only charges the selling spirituous liquors by retail, but also the *permitting the same to be drank in the house*, and in this latter specification differs from the case of *Woods, etc., v. Com.* (1 B. Mon. 74), in which the *selling* by retail only was specified. And if it were conceded that the offence charged is one for which a presentment might be maintained, it would not follow that an indictment would not also be good. An indictment embraces all the requisites of a good presentment, and even more, namely, the signature of the attorney for the commonwealth, which cannot render it bad as a presentment. Nor can the fact that an indictment has been found for an offence for which a presentment would lie, prevent the court from assessing the fine without the intervention of a jury in any case in which he could assess it upon a presentment. Nor is the objection that the foreman of the grand jury has signed the indictment under the words 'a true bill,' indorsed on the same, sustainable. The statute of 1814 (Stat. Law 1st, 541), according to its grammatical construction, requires indictments as well as presentments to be *signed* by the foreman; it does not direct *where* the signature is to be placed; and though it may be implied that it was intended to be placed at the foot of the presentment or indictment, as the object of the signature was to show the court that it had been passed upon and found by the grand jury, this is as well shown by an indorsement of his signature as by placing it at the foot of the indictment, and either form, we have no doubt, will suffice."

known, and by then and there permitting the same to be drank in said tippling-house, he the said A. B. not then and there being a licensed tavern-keeper, etc.

(819) *Same in Tennessee.*(k)

That D. S., late of, etc., on, etc., unlawfully did keep a tippling-house, and then and there did vend and retail spirituous liquors in less quantities than one quart, and by the quart, intended to be drunk on the premises, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(820) *Same in Mississippi.*

That on, etc., A. B., etc., at, etc., did then and there unlawfully sell and retail vinous and spirituous liquors, to wit, wine, rum, gin, brandy, whiskey, ale, and porter, in a less quantity than one gallon, to one C. D., and to other persons to the jurors aforesaid unknown, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That on, etc., A. B., being then and there a tavern-keeper and innkeeper, with force and arms, at the county of aforesaid, did then and there unlawfully, gratuitously, and without special charge therefor, offer, give, and deliver vinous and spirituous liquors, to wit, wine, rum, gin, brandy, whiskey, ale, and porter, in a less quantity than one gallon, to one J. K., and to other persons to the jurors aforesaid unknown; which said J. K., and which said other persons, were then and there the guests of the said A. B., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That on, etc., the said A. B., being then and there a tavern-keeper and innkeeper, with force and arms, at the county of aforesaid, did then and there, by evasion, subterfuge, and chicanery, sell and dispose of spirituous liquors, in violation of the plain intent and meaning of an act and law of the state of Mississippi, bearing date the ninth day of February, in the year of our Lord one thousand eight hundred and thirty-nine, and entitled "An act for the suppression of tippling-houses, and to discourage and prevent the odious vice of drunkenness," contrary, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(k) This count was upheld in *Sanderlin v. State*, 2 Humph. 315.

(820a) *Selling to person of intemperate habits under Alabama statute.*

That J. T., etc., before the finding of this indictment, did sell or give spirituous, vinous, or malt liquors, to J. S., a person of known intemperate habits; against the peace, etc.(l) (*Conclude as in book 1, chapter 3.*)

(820b) *Same under Pennsylvania statute.*

That A. B., etc., late of the said county, on the day of in the year of our Lord one thousand eight hundred and eighty at the county aforesaid, and within the jurisdiction of this court, with force and arms, etc., being then and there the keeper of a certain hotel, inn, and tavern, did, then and there, unlawfully and wilfully furnish, and cause to be furnished, to one D. D., to be used as a beverage, certain intoxicating liquors, wines, ales, and beer, the said D. D. then and there being a person of known intemperate habits, and one M. D., the wife (son or daughter) of the said D. D., having within the space of three months from the day and year aforesaid given a distinct notice to the said A. B., forbidding him from furnishing the said D. D. with such intoxicating drinks and liquors as aforesaid, contrary, etc.(n) (*Conclude as in book 1, chapter 3.*)

OFFENCES TO DEAD BODIES.

(821) *Digging up and taking away a dead body from a church-yard, at common law.(n)*

That A. B., late of, etc., on, etc., with force and arms, etc., at, etc., the church-yard of and belonging to the parish church of the

(l) It was held that this indictment was sufficient although it does not negative the requisition of a physician. *Tatum v. State*, 63 Ala. 147.

(m) For the above I am indebted (1881) to Mr. Ker, formerly assistant district attorney in Philadelphia.

(n) Dickinson's Q. S. 6th ed. 395.

This has always been held a misdemeanor indictable at common law (4 Bla. Com. 235; 2 T. R. 733, *R. v. Lynn*; Wh. Cr. L. 8th ed. § 1432a); and so is selling the dead body of a person, capitally convicted, for dissection, whether there is direct evidence or not that the defendant sold the body for lucre and gain and for dissection. *R. v. Candick*, 1 D. & R. N. P. C. 13; *Graham, B.* If the shroud, coffin, or any other chattel accompanying the dead body be taken away, with intent to steal, such taking is a larceny. See 2 & 3 Wm. IV. c. 75.

(j) Archbold's C. P. 5th Am. ed. 786; *R. v. Gills*, R. & R. 366, note; *Com. v. Cooley*, 10 Pick. 37. To cast a body into a river without the rites of sepul-

same parish there situate, unlawfully did enter, and the grave there, in which the body of one M. B., deceased, had lately before then been interred, and then was, with force and arms, unlawfully, voluntarily, wilfully, and indecently did dig, open, and afterwards, to wit, on the same day and year aforesaid, with force and arms, at, etc., the body of him the said M. B., out of the grave aforesaid, unlawfully and indecently did take and carry away ; against, etc. (*Conclude as in book 1, chapter 3.*)

(822) *Removal of dead body, under Massachusetts statute.(n')*

That W. S. and J. K., late of, etc., on, etc., did unlawfully, feloniously, knowingly, and wilfully remove, and convey away from the said town of a certain human body, the body of J. M., who had deceased at W., previous to the said removing and conveying away aforesaid, they the said W. S. and J. K. not being authorized by the board of health or overseers of the poor, or the selectmen of the said town of W. (and the said W. S. and J. K. then and there, to wit, at the time of removing said human body, intending to use and dispose of it for the purpose of dissection), against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(823) *Disinterring dead body.(o)*

That S. L., of Chelsea, in the said county of Orange, on the night of the twenty-fifth of October, in the year of our Lord

ture is a misdemeanor. Kanavan's case, 1 Greenl. 226. If the body cannot be recognized, it should be stated as that of a person to the jurors unknown; and the same course of pleading can be followed where it is doubtful where the body was taken from. R. & R. 366, note. See Wh. Cr. L. 8th ed. § 1432a.

A form for the withholding Christian burial from a child will be found *supra*, 717.

(n') This is under statute 1830, ch. 57; Rev. Sts. ch. 130, § 19; and with the exception of the part in brackets was before the supreme court on error, in *Com. v. Slack*, 19 Pick. 304. The judgment was arrested, Wilde, J., saying: "We are of opinion, therefore, that, as there is no averment in this indictment that the defendant removed the dead body with the intent to use or dispose of it for the purpose of dissection, and as we consider such intent as the essence of the crime, the indictment is defective." This being the only error noticed by the court, its correction may bring this form sufficiently within the provisions of the statute. Some doubt, however, seems to have been entertained whether the statute was meant to include any cases except those occurring after sepulture, and it would be better to insert a second count with an averment to meet this difficulty.

(o) *State v. Little*, 1 Vt. 331.

"This indictment is not drawn with great caution. It does not attempt to

one thousand eight hundred and twenty-six, with force and arms, at Washington, in the said county of Orange, the public burying-ground, near the west meeting-house in said Washington, unlawfully did enter, and the dead body of one B. P. C., then lately before laid in a coffin and interred in the same burying-ground, did then and there unlawfully dig up, disinter, remove from the said coffin, disturb, and carry away, to the evil

charge the defendant in the words of the statute. Nor was that necessary, if other words equivalent were inserted. It is objected to the indictment that it neither adopts the words of the statute, nor those that are equivalent. The indictment, instead of saying 'the remains of any dead person,' says 'the dead body of Benjamin P. Calfe, then lately before laid in a coffin and interred in the same burying-ground.' What are the remains of a dead person? the dead body is the answer. This is well understood in common parlance. Nothing else does remain after the spirit has fled, but the dead body. In speaking of a person who is living, if we say that his body was hurt, wounded, etc., it is well understood in its appropriate sense. It means the body of a person, not of his horse or his ox.

"The objection that it does not appear that Benjamin P. Calfe was a person—that he ever lived and died, etc.—are rather too nice and technical to be sanctioned. All the statutes against crimes use the expression, 'if any person shall do such an act;' 'if any person shall break the peace;' 'if any person shall counterfeit the coins,' etc. No indictment upon these statutes was ever seen alleging that the defendant was a person. The charge is that A. B. did such an act. This is sufficient.

"So of some other circumstances noticed as objections. They seemed answered by reading the indictment as every person would understand it. 'That the defendant at Washington, in said county, with force and arms, the public burying-ground near, etc., in said Washington, unlawfully did enter, and the dead body of one Benjamin P. Calfe, then lately before laid in a coffin, and interred in the same burying-ground, did then and there unlawfully dig up, disinter, remove from the said coffin, disturb, and carry away.' All these expressions combined leave but little of that uncertainty supposed by the objections.

"But it is urged that there is no averment that the dead body remained interred at the time it was dug up by the defendant. That it only appears argumentatively. This would have been plausible, if there were no allegation of interment. That the defendant dug up the body would strongly imply that it was in a state capable of being dug up; that is, that it was interred. Yet this would be inference only. But when the indictment not only alleges that the defendant dug up, disturbed, disinterred, and removed the body of Benjamin P. Calfe, but also alleges that the same dead body had then lately been laid in a coffin and interred in the same burying-ground, it seems too much to call upon the court to presume, that, notwithstanding all these allegations, the body might have been disinterred in the mean time and not then capable of being dug up by the defendant.

"It is hardly supposable that the defendant could have ever suffered at the trial, or been jeopardized, by the admission of any testimony but what applied to the indictment, according to its most natural signification, and was intended by the grand jury who presented the same. If proof had been offered of the disintering of any other but a human body, or any other but the body of a man or boy of the name of Benjamin P. Calfe, it would have been excluded, as not supporting the indictment."

example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(824) *Removing a body from its grave where there are near relatives, under Ohio statute.*(p)

That A. B., late of the county of aforesaid, on the day of in the year of our Lord one thousand eight hundred and at the incorporated town and village of in the county of aforesaid, the grave of one M. N., deceased, there situate and being, and in which said grave the body of the said M. N., deceased, had then been interred, and then and there was, unlawfully and maliciously did open, and then and there the body of the said M. N., deceased, maliciously did remove and carry away from its said grave for the purpose of dissection and surgical experiments, without the consent of any of the near relatives of the said M. N., deceased, although there were divers of the said near relatives of the said M. N., deceased, then living and residing near by and in the county aforesaid, to wit (*here set forth what relatives there were*), which he, the said A. B., then and there well knew.

(825) *Same in Indiana.*(q)

That A. B., on, etc., at, etc., did then and there remove the dead body and corpse of one P. W. from interment in a public burying-ground, in which she had been then and there interred, without having obtained the consent therefor of the said P. in her lifetime, nor of her near relations since her death, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(826) *Selling the body of a capital convict for dissection, dissection being no part of the sentence.*(r)

That on, etc., one E. L. was publicly executed, at the parish of St. Mary, Newington, in the county of Surrey; that on the day and year aforesaid, in the parish and county aforesaid, one G. C., of, etc., undertaker, was retained and employed by W.

(p) Warren's C. L. 375.

(q) Sustained in *State v. McClure*, 4 Blackf. 328.

(r) *R. v. Cundick*, D. & R. N. P. C. 13; 16 Eng. Com. Law, 413. The defendant was convicted and sentence passed.

W., the keeper of the jail in and for the said county, to bury the body of the said person so executed, for certain reward to be therefor paid to the said G. C., by and on behalf of the said county, and in pursuance of the said retainer and employment, the body of the said person, so executed as aforesaid, was then and there delivered to the said G. C., for the purpose of being so by him buried as aforesaid, and it then and there became the duty of the said G. C. to bury the same accordingly; but that the said G. C., being an evil disposed person, and of a most wicked and depraved disposition, and having no regard to his said duty, nor to religion, decency, morality, or the laws of this realm, did not, nor would bury the said body so delivered to him as aforesaid, but on the contrary thereof, on, etc., at, etc., aforesaid, unlawfully and wickedly, and for the sake of wicked lucre and gain, did take and carry away the said body, and did sell and dispose of the same for the purpose of being dissected, cut to pieces, mangled, and destroyed, to the great scandal and disgrace of religion, decency, and morality, in contempt of our said lord the king and his laws, to the evil example of all other persons in like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(827) *Preventing the interment of a dead body by an arrest.*(s)

That A. B. and C. D., on, etc., with force and arms, at, etc., in, etc., a certain dead body, to wit, the body of M. B., then and there being, unlawfully and wickedly did arrest,(t) take, and carry away, and cause and procure to be arrested, taken, and carried away, with an unlawful and wicked intention to prevent the interment and burial of the said dead body of the said M. B., which ought to have been done and performed according to the rites and ceremonies of the church of that part of this realm called England, against, etc. (*Conclude as in book 1, chapter 3.*)

(s) Dickinson's Q. S. p. 393, 6th ed.

(t) A vulgar notion at one time prevailed, that it was lawful to arrest the corpse of a person deceased, for a civil debt due from the party in his lifetime. But now it is clearly ascertained that no such practice is lawful; indeed, to prevent the body from being interred is an offence against decency, and as such indictable under the class of misdemeanors. *Jones v. Ashburnham*, 4 East, R. 465; *Young's case*, 2 T. R. 734; 2 Bla. Com. 472, 8th ed.; 1 Burn's Ecc. Law, by Tyrwhitt, 258, 259.

OFFENCES AGAINST LOTTERY LAWS.

(828) *Selling lottery tickets.*(u) *General frame of indictment.*

That A. B., late, etc., on, etc., at, etc., unlawfully, etc., did sell(v) to one C. D.(w) a certain lottery ticket (x) (*where only lot-*

(u) See Wh. Cr. L. 8th ed. § 1490.

(v) Where the statute includes within the offence to offer to sell, etc., the averment "did sell and offer for sale" is not duplicity. *Com. v. Eaton*, 15 Pick. 273; *Com. v. Harris*, 13 Allen, 534; Wh. Cr. L. 8th ed. § 1494; *infra*, 833, note.

(w) The more judicious course is to individuate the offence by naming the vendee, or averring the sale to be to a person unknown. *Com. v. Thurlow*, 24 Pick. 374; *State v. Walker*, 3 Harring. 547; *Com. v. Eaton*, 15 Pick. 273. The weight of authority is that one or the other allegation must be made. *People v. Taylor*, 3 Denio, 99; *People v. Adams*, 17 Wend. 475; *State v. Munger*, 15 Vt. 290; *State v. Stucky*, 2 Blackf. 289; *State v. Maxwell*, 5 Ib. 230; *Butler v. State*, Ib. 280.

(x) In this note will be considered—

(1) To what cases the term *ticket* applies.

(2) In what cases the ticket should be set forth.

(1) *To what cases the term ticket applies.* The general effect of the term, under the statutes usually in force, is discussed by the supreme court of Missouri as follows:—

"The principal point made in this branch of the case is, whether the proof of the sale of a quarter ticket will sustain the indictment which charges that the defendant sold a ticket. The ticket proved to be sold read, 'The holder of this ticket will be entitled to one-fourth of the prize drawn to its number.' This was physically a ticket, not part of a ticket. That its holder was entitled, if among the fortunate, to only one-fourth of the prize drawn by its corresponding number, does not make it less a ticket. It was complete in itself, and so purports to be. It is denominated on its face a ticket, though it appeared that the holder was only entitled to a certain portion of prize drawn to its number. The instruction, therefore, asked of the court on this subject, was properly refused.

"It is also insisted that, as the statutes prohibit the sale of lottery tickets, an indictment will not lie for selling a single ticket. To sustain this objection, the decisions in England on the statute of 14 Geo. II. c. 6, which makes it felony, without benefit of clergy, to steal any cow, ox, heifer, etc., are cited. It was held, under that statute, that where the indictment charged the defendant with stealing a cow, and the evidence proved it to be a heifer, the variance was fatal, because the use of both words in the statute proved that the legislature did not consider them synonymous. Several adjudications of a similar character have been made in England; and the courts of that country, in *favorem vite*, have commenced some very nice distinctions. Admitting that our courts would be willing to adopt such refinements in case of misdemeanors, it is not perceived that this case falls within the class of cases to which we have alluded. Had the penalties of the British statute been directed against stealing of cows or heifers, etc., and had it been adjudged that under such a law the stealing of one cow or one heifer was not an offence within its meaning, the precedent would have been apposite." *Freleigh v. The State*, 8 Mo. 612. See Wh. Cr. L. 8th ed. §§ 1490 *et seq.*

(2) *In what cases the ticket should be set forth.* Where only lotteries of certain classes are prohibited, it would seem necessary to show, by setting forth at least the purport of the ticket, that it comes within the prohibited class (*People v. Taylor*, 3 Denio, 99; *Com. v. Manderfield*, 8 Phila. 457; *Com. v. Gillespie*,

teries of a certain class are prohibited, particularize the class),(y) contrary, etc. (Conclude as in book 1, chapter 3.)

[As to joinder of conspiracy counts, see supra, 607, note, 624.]

(829) *Same where ticket is lost or destroyed, or in defendant's possession.*

That A. B., late, etc., unlawfully did sell to one C. D. a certain lottery ticket, which said ticket the said jurors cannot here set forth, by reason that it is in the possession of the said A. B., who, though notified so to do, to wit, on, etc., at, etc., has refused and neglected to produce it for the inspection of the said jurors;(z) *(or it seems it is enough to say, "a more particular description of which is to the said jurors unknown")*),(a) contrary, etc. *(Conclude as in book 1, chapter 3.)*

(830) *Selling ticket in New Hampshire.(b)*

That J. F., of, etc., on, etc., at, etc., unlawfully did sell to one F. E., a part of a ticket, that is to say, one quarter part of a ticket, at and for the price of fifty cents, in a certain lottery not authorized by the legislature of said state, contrary, etc., and against, etc. *(Conclude as in book 1, chapter 3.)*

7 S. & R. 469; *State v. Schribner*, 2 Gill & J. 246); but where all lotteries are illegal, the averment, in the words of the act, that a ticket was sold, together with the name of the vendee, would seem enough. *Cohen v. Virginia*, 6 Wheat. 265; *Freleigh v. State*, 8 Mo. 606; *People v. Taylor*, 3 Denio, 99; *State v. Follet*, 6 N. Hamp. 53; *Com. v. Clapp*, 5 Pick. 41; *Davis's Prec.* 162; though see observations in Wh. Cr. L. 8th ed. § 1493. In Pennsylvania, under the act of March 16, 1847, the setting forth the ticket is expressly dispensed with. But under any circumstances, the averment that "a more particular description of which said lottery is to the jurors aforesaid unknown," will relieve the pleader from the necessity of any further recital. See Wh. Cr. L. 8th ed. § 1493; *Picket v. People*, 8 Hun, 83.

(y) Thus, at one time, in Pennsylvania, certain lotteries were licensed, in which case it was necessary to aver the ticket to have been "in a lottery unauthorized," etc. (*Com. v. Gillespie*, 7 S. & R. 469); and in New York, in indictments for promoting lotteries, it was held necessary, in conformity with the statutory description, to aver the lottery to be one set on foot *for the purpose of disposing of property*. *People v. Payne*, 3 Denio, 88.

(z) See, as to mode of setting out document, *supra*, 264.

(a) In *People v. Taylor*, 3 Denio, 91, this allegation was held good.

(b) This count was sustained in *State v. Follet*, 6 N. Hamp. 53.

(831) *Same in Massachusetts.(c)*

That E. W. D., of, etc. on, etc., at, etc., did unlawfully have in his possession, with intent to offer for sale and to sell, and

(c) This indictment was sustained in the supreme court of Massachusetts, in *Com. v. Dana*, 2 Mete. 329.

"The objection to the first and several other counts in the indictment," said the court, "is, that although it alleges that the defendant, at Boston, etc., unlawfully had lottery tickets in his possession, with intent to sell the same, it does not allege an intent to sell the same within this commonwealth; and the question is, whether such an averment is necessary.

"It is obvious, as this indictment follows the words of the statute, that the offence intended to be charged in the indictment is the same offence which is punishable by the statute. We are aware that it is not always sufficient to charge an offence in the words of a statute; because a statute must often use general terms and comprehensive descriptions; whereas an indictment requires certainty in charging the offence so specifically as to give the party notice of what he is to meet, and enable him to traverse the facts averred. But when the statute itself is sufficiently specific, a charge of the offence in the words of the statute is sufficient, in point of certainty. Here the indictment charges an unlawful possession of lottery tickets, with the averment of an intent to sell generally, including, of course, as well this commonwealth as all other places. It is, in this respect, general and unlimited.

"Where the possession of an article is made punishable because so held with a guilty intent, if the act intended is *malum in se*, it is no answer to the charge, that it was intended thus to be committed out of the commonwealth; it is within the words of the statute and the mischief intended to be prevented. *Com. v. Cone*, 2 Mass. 132.

"Perhaps a different rule should prevail where the act intended to be done is not criminal in itself, but only made so by the statute. If, therefore, it should appear, in the trial of an indictment founded on this statute, that the lottery tickets were in the possession of a person passing through the state, and held only for the purpose of carrying them into another state for sale, it is very questionable, whether such proof would support the indictment. It certainly would not, if the construction which the defendant puts upon the statute is a true one. He maintains that, by a reasonable construction, the statute intends to punish the mere possession of lottery tickets, when there is an intent to sell them 'in this commonwealth,' though not so expressed. If this is correct, then the same construction must be put upon the same words in the indictment; and it would be the duty of a judge, on the trial of such indictment, to instruct a jury, that if such an intent were not proved to their satisfaction, they must acquit the defendant. It appears to the court, therefore, that the question is rather, whether the evidence is sufficient to maintain the indictment, than whether the indictment is sufficiently certain. If the case was as above supposed, that the only intent proved was an intent to carry the tickets into another state and sell them there, the course would be, to request the court to instruct the jury that such proof was not sufficient to support the indictment; and should the court decline giving such instruction, or instruct them otherwise, then to take the exception. But here no question is made of the sufficiency of the evidence to support the finding of an intent to sell in this commonwealth. The question is, whether it was necessary to aver it in the indictment. Had the statute expressed such qualification of the possession—that is, with an intent to sell within the commonwealth—it must have been so averred in the indictment, because it would have been a necessary ingredient in the description of the offence. As it is not so expressed in the statute, this rule does not apply; and the court are of opinion, that the intent to sell gen-

aid and assist in selling, negotiating, and disposing of, five hundred certain lottery tickets and five hundred shares, to wit, halves and quarter tickets, being tickets for halves and quarters of prizes drawn to their respective numbers, all of said tickets and shares being in a certain lottery not authorized by law in this commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in state of Rhode Island; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That E. W. D., of, etc., on, etc., at, etc., did unlawfully have in his possession, with intent to sell it, a certain other lottery ticket in a certain lottery not authorized by law in said commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in Rhode Island, which share of a lottery ticket is of the purport and effect following, that is to say (*setting forth ticket*), against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That E. W. D., of, etc., on, etc., at, etc., did unlawfully invite and entice, and attempt to invite and entice, sundry persons whose names to the said jurors are as yet unknown, to purchase and receive certain lottery tickets and certain shares, to wit, halves and quarter tickets, being tickets for halves and quarters of prizes drawn to their respective numbers, all of said tickets and shares being in a certain lottery not authorized by law in this commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in state of Rhode Island; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That E. W. D., of, etc., on, etc., at, etc., did unlawfully have in his possession, with intent to sell it, a certain other lottery ticket in a certain lottery not authorized by law in said commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in Rhode Island, which share of a lottery ticket is of the purport and effect following,

erally being averred in the indictment, in the words of the statute, it is sufficient, although it should be held, on trial, that proof of an intent to sell in another state only would not bring the case within the statute so as to warrant a conviction.

"There being several counts in the indictment, to which there is no other exception than the above, it becomes unnecessary to consider the other alleged causes for arresting the judgment."

that is to say (*setting forth ticket*), against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That E. W. D., of, etc., on, etc., at, etc., did unlawfully advertise lottery tickets for sale, and shares in lottery tickets for sale, and did set up and exhibit representations of a lottery and of the drawing thereof, indicating thereby where a lottery ticket or a share thereof, and certain lottery tickets and certain shares, to wit, halves and quarter tickets, may be purchased and obtained, all of said tickets and shares being in a certain lottery not authorized by law in this commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in state of Rhode Island; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

That E. W. D., of, etc., on, etc., at, etc., did unlawfully have in his possession, with intent to sell it, a certain other lottery ticket in a certain lottery not authorized by law in said commonwealth, to wit, in a certain lottery called School Fund Lottery, for the benefit of public schools in Rhode Island, which share of a lottery ticket is of the purport and effect following, that is to say (*setting forth ticket*), against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(832) *Advertising lottery ticket in same, under stat. 1825, ch. 184.(d)*

That W. W. C., of, etc., on, etc., at, etc., did unlawfully advertise, and cause to be advertised, in a certain newspaper by him published, and called the Evening Gazette, lottery tickets and parts of lottery tickets, for sale in lotteries not authorized by the laws of said commonwealth, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(833) *Selling lottery tickets in same, under stat. 1825, ch. 184, § 1.(c)*

That B. E., of, etc., on, etc., at, etc., did unlawfully offer for sale, and did unlawfully sell to one J. G., one half of a lottery.

(d) This indictment was sustained on motion in arrest of judgment, it being held unnecessary to allege the tickets were advertised as being for sale within this commonwealth, or to specify the tickets. See *Com. v. Dana, ut supra*.

(e) *Com. v. Easton*, 15 Pick. 273.

This indictment was resisted on ground of duplicity, it being alleged that to "sell" and to "offer for sale," were distinct offences. The court, however, adjudged the one offence to be a stage within the other, and sustained the indictment

ticket in a lottery not authorized by the laws of this commonwealth, called the Connecticut lottery, for the erection of a bridge at Enfield Falls, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(834) *Selling ticket in New York.*(f)

That, etc., at, etc., on, etc., did unlawfully vend and sell to one W. H. F. a certain ticket, purporting to be in the Delaware lottery, etc. (*describing ticket at large*), in contempt of the people of the state of New York, and against, etc. (*Conclude as in book 1, chapter 3.*)

(835) *Another form for same.*

That A. B., etc., on, etc., at, etc., unlawfully did vend and sell to one a certain ticket, purporting to be in the lottery, numbered called class number series, with certain combination numbers thereon, to wit, combination numbers which said ticket purported to entitle the holder thereof to one of such prize as might be drawn to its number, if demanded within after the drawing, subject to a deduction of fifteen per cent., payable after the drawing, which said lottery on the face of the said ticket purported that the drawing thereof would take place at and was dated in contempt of the people of the state of New York, and against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

on demurrer. This principle is consistent with that established in the analogous averments of "counterfeiting and causing to be counterfeited," and of "keeping a gaming-house and causing others to game therein." See *supra*, p. 25 *et seq.* Where the offences are of a distinct nature, neither of them capable of being resolved into the other, it is error to join them in the same count. Where they are several in their nature, and yet of such a character that one of them, when complete, necessarily implies the other, there is no such repugnancy as to make their joinder improper. In fact, under such circumstances, it is less embarrassment to the defendant to be thus charged, than to have each stage of the offence split from the context, and set in a distinct count. *Supra*, vol. i. p. 25.

It will be observed that in this form the offence is distinguished by the description of the lottery in which the ticket was sold, as well as of the vendee. Some such ear-marks are necessary for the protection of the accused, for if the defendant be merely charged with selling a lottery ticket, there is nothing on the record to show him what to plead.

(f) This count was sustained, it being held unnecessary to aver that the lottery for the selling of a ticket in which the party was indicted, was not expressly authorized by law. *People v. Sturdevant*, 23 Wend. 418. The counts immediately succeeding are more special.

That A. B., etc., at, etc., did unlawfully offer to vend, sell, barter, furnish, and supply, and did vend and sell, and cause and procure to be vended and sold, to one a ticket, and part and share of a ticket, and a paper or instrument purporting to be a ticket, and to be a share or interest in a ticket of a certain lottery, device, and game of chance, not expressly authorized by law, which said ticket, share of a ticket, paper, or instrument was and is to the purport following, that is to say, in contempt of the people of the state of New York, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(836) *Promoting lottery in same, being the form in common use.*

That A. B., etc., on, etc., at, etc., the said being unauthorized by special laws for that purpose, unlawfully did promote a certain lottery, called which lottery was set on foot for the purpose of disposing of money, by exposing to sale tickets and parts of tickets in the said lottery, and by selling to one at the ward, city, and county aforesaid, a certain ticket in the said lottery, called the of a ticket with the combination numbers thereon, which said ticket was and is numbered the whole price or value for which said lottery was made being to the jurors aforesaid unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(837) *Carrying on lottery whose description is unknown to jurors.(g)*

That A. B., etc., on, etc., at, etc., being unauthorized, etc. (*as in last form*), did publicly carry on a certain lottery (a more particular description of which said lottery is to the jurors aforesaid unknown), for the purpose (*following statute*), etc., in contempt, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(838) *Selling lottery policy in Pennsylvania under act of March 16, 1847.(h)*

That A. B., etc., on, etc., at, etc., unlawfully did sell to a cer-

(g) This count was sustained, though with much reluctance, by the supreme court of New York in *People v. Taylor*, 3 Denio, 91.

(h) Under this act indictments merely averring a sale, but not stating to whom, or mentioning the ticket, were held insufficient on demurrer by Kelley, J., in the Philadelphia quarter sessions, June, 1847. See *supra*, 828, note.

tain person whose name is to this inquest unknown (*or to one A. B.*), a certain lottery policy, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(839) *Selling ticket in same under same.*

That the said A. B. afterwards, on, etc., did unlawfully sell (and expose for sale; see *supra*, 828, note *x*), to one C. D. (*or as in the last count*), a lottery ticket, to be drawn in a lottery in the state of (*naming the state or country*), contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(840) *Same under repealed act of March 1, 1833. First count, sale of ticket, ticket being set forth.(i)*

That N. S., late of, etc., on, etc., at, etc., unlawfully did sell and expose to sale, and cause to be sold and exposed to sale, a lottery ticket in a lottery not authorized by the laws of this commonwealth, which said lottery ticket was in the words and figures following, that is to say (*setting forth the ticket*), contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(841) *Second count. Conspiracy to sell a lottery ticket, etc., the defendant being singly charged with a conspiracy with others unknown.*

That the said N. S., afterwards, to wit, on the same day and year aforesaid, at the city aforesaid, and within the jurisdiction of this court, together with divers other evil disposed persons to the jurors aforesaid as yet unknown, did unlawfully and wickedly conspire, combine, confederate, and agree together, unlawfully and wickedly contriving and intending to acquire unjust and illegal lucre to themselves, to sell and expose to sale, and cause and procure to be sold and exposed to sale, a lottery ticket and tickets in a lottery not authorized by the laws of this commonwealth, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(i) *Com. v. Sylvester*, 6 Penn. L. J. 383. In this case it was held that not only might the statutory misdemeanor and the common law conspiracy be joined, but that on a verdict of guilty on both counts, the court would impose a separate sentence on each. *Supra*, 607, note, 624.

See also *Com. v. Gillespie*, 7 S. & R. 469; *Com. v. Canfield*, Sup. Ct. March, 1827. No. 39; *Com. v. Conine*, *Ib.* No. 20. As to joinder of conspiracy, see *supra*, 607, note, 624; Wh. Cr. L. 8th ed. § 1387.

(842) *Same in Virginia.(j)*

That J. P., etc., since, etc., to wit, on, etc., at the city aforesaid, unlawfully did sell, and cause to be sold, one certain lottery ticket in a certain lottery to be drawn in this commonwealth, to wit, in a lottery called A. and F. Turnpike Lottery, and then and there advertised to be drawn at the said lottery not being a lottery authorized to be drawn by any contract made with this commonwealth prior to the 25th day of February, 1834, or by any contract made since in pursuance of any law of this commonwealth passed prior to the said 25th of February, 1834, the drawing of which lottery was not to extend by virtue of said last mentioned contract beyond the 1st day of January, 1840, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(843) *Selling tickets, under Ohio statute.(k)*

That A. B., on the sixth day of January, in the year of our Lord one thousand eight hundred and fifty-five, in the county of Hamilton aforesaid, did sell to certain persons, whose names are to this affiant unknown, divers, to wit, one hundred, tickets, for one hundred shares in a certain scheme of chance, called and denominated the "Capital City Art Union," which said tickets were not the lottery tickets of lotteries authorized by any law of this state, contrary, etc.

(844) *Opening of a lottery scheme, called the "Western Reserve Art Union," under Ohio statute.(l)*

That A. B., on the first day of March, in the year of our Lord one thousand eight hundred and fifty-two, in the county of Cuyahoga aforesaid, unlawfully did publicly open, set on foot, promote, and make a certain lottery and scheme of chance, under the name and denomination of the "Western Reserve Art Union," by means of which said lottery and scheme of chance, the said A. B., and E. F., J. N., W. P., M. P., and W. R., then and there did expose and set to sale, amongst other things, one silver lepine watch, of the value of twelve dollars, one silver

(j) This count was supported in *Phalen v. Com.*, 1 Robinson, 713, 714.

(k) Warren's C. L. 355.

(l) Warren's C. L. 355.

lever watch, of the value of fifty dollars, one Buffalo wagon, of the value of seventy-five dollars, etc., contrary, etc.

(845) *Publishing scheme of chance, under Ohio statute.(m)*

That A. B., etc., on the seventh day of January, in the year of our Lord one thousand eight hundred and fifty-five, in the county of Hamilton aforesaid, did unlawfully publish an account of a certain scheme of chance, called "Grand Mammoth Gift Concert," by then and there printing the same in the (*here give the name of the paper*), a newspaper published and printed in said county, which said publication then and there contained a statement of the time when, and the place where, said scheme of chance would be drawn, and the prizes therein, the price of the tickets thereof, and the places where the tickets to the same may be obtained, which said publication then and there made in said (*give the name of the paper*), was of the tenor and effect following, that is to say: "Grand Mammoth Gift Concert. There is a good time coming. 100 extensive and valuable Gifts, worth \$1289.00. Tickets only \$1.00. Tickets limited to 1400. Mr. A. B., Jr., respectfully announces, that he will respond to the numerous invitations of his host of friends, and give one more gift concert, at the Melodeon Hall, on Thursday evening, February 22d, 1855. The entertainment will be conducted by the best musical talent in the country; the gifts are all valuable and useful in every family, and will be found worthy of attention. Among them, to which particular attention is directed, is, 1 magnificent rosewood piano-forte, \$300.00; exhibition of the Mammoth cave of Kentucky, in perfect order, and cost originally \$1000, \$330.00; 1 large patent English lever gold hunting watch, capped and jewelled, \$125.00; 1 fine brilliant diamond gold ring, its intrinsic value \$50.00; 1 large heavy gold watch, \$40; 3 splendid new guitars, \$75.00; 1 splendid table, \$18.00; 1 extra large cherry dining table, \$12.00; 1 beautiful fine chenille ring, \$15.00; 1 beautiful new style parlor lamp, \$12.00; 1 large looking-glass, \$15.00. Want of room forbids specifying the other gifts. They consist of acceptable articles to the ladies, viz.: fancy washstands, parlor ornaments, with large rosewood frames,

large gold locket, gold spees, silver chains, etc. etc. A full description will be sent to each patron. The proprietor does not wish to humbug his patrons and friends by offering premiums seldom awarded to those who will sell the highest number of tickets, but will allow postmasters and responsible persons, who will act as agents, a full remuneration. To clubs, six tickets for \$5.00, larger orders in proportion. Remember, tickets are limited to 1400. First come, first served. For tickets, and other information, address, post-paid, A. B., box 1299, Cincinnati, O. ;" contrary, etc.

CHAPTER IV.

RIOT, AFFRAY, TUMULTUOUS CONDUCT, RESCUE, PRISON BREACH, ETC.; RESISTANCE TO AND ASSAULTS ON OFFICERS OF JUSTICE. (a)

RIOT AND AFFRAY.

- (846) General frame of indictment for riot.
- (847) Affray at common law.
- (848) Unlawful assembly and assault.
- (849) Riot, and hauling away a wagon.
- (850) Riot, in breaking the windows of a man's house.
- (851) Riot, and disturbing a literary society, under Ohio statute.
- (852) Obstructing authorities, under Ohio statute.
- (853) Obstructing authorities and preventing proclamation of riot.
- (854) Riot, and refusal to disperse.
- (855) Riot, and pulling down a dwelling-house in the possession of prosecutor.
- (856) Riot, and false imprisonment.
- (857) Disturbing the peace, etc., on land occupied by the United States for an arsenal.

DISTURBANCE OF ELECTIONS.

- (858) Disturbance of elections in Massachusetts.
- (859) Another form for same.
- (860) Interrupting a judge of the election in Pennsylvania.
[*For corrupt interference with elections, see infra, 1016.*]

DISTURBING RELIGIOUS MEETING.

- (861) Disturbing a religious meeting, under the Virginia statute.
- (862) Same, under Rev. Sts. Mass. ch. 130, § 171.
- (863) Disturbing a congregation worshipping in a church, at common law.
- (864) Disturbing same in a dwelling-house.
- (865) Dressing in a woman's clothes, and disturbing a congregation at worship.

GOING ARMED, ETC.

- (866) Going armed, etc., to the terror of the people, at common law.
- (867) Carrying a dangerous weapon, under Indiana Rev. Sts.

(a) See Wh. Cr. L. 8th ed. § 1535 *et seq.*

RIOT, AFFRAY, ETC.

- (868) Maliciously firing guns into the house of an aged woman, and killing a dog belonging to the house.
- (869) Breach of peace, tumultuous conduct, etc., in Vermont.
- (869a) Furious driving, under English statute.
- (869b) Same against horse-car conductor, under English statute.

REFUSING TO QUELL RIOT, ETC.

- (870) Refusing to aid a constable in quelling a riot.
- (871) Refusing to assist a constable in carrying offender to prison.

RESCUE, ETC.

- (872) Assault and rescue.
- (873) Against two for a rescue, one of them being in custody of an officer of the marshal's court, upon process, etc.
- (873a) Rescue of felon from constable.
- (874) Assault, and rescuing goods seized as a distress for rent after a fraudulent removal.
- (875) Assault on an officer of justice, and taking from him goods which had been seized by him on execution.
- (876) Rescuing goods distrained for rent of a house.
- (878) Prison breach.

ASSAULT ON AND RESISTANCE TO OFFICERS, ETC.

- (879) Assault on a constable, etc.
- (880) Another form for same.
- (881) Second count. Averring arrest of defendant by said constable, etc., and proceedings before a justice of the peace, upon which defendant was committed in default of bail, charging resistance by defendant to the officer when detaining him in custody.
- (882) Resistance to a constable employed in the arrest of a fugitive charged with larceny.
- (883) Resistance to a peace-officer in the performance of his duties; form used in New York.
- (884) Resisting constable, while serving state warrant, under Ohio statute.
- (885) Resistance to the marshal of the United States in the service of a writ of arrest.
- (886) Refusal to aid a constable in the service of a *capias ad respondendum*, issued by a justice of the peace.
- (887) Assault with intention to obstruct the apprehension of a party charged with an offence.
- (888) Assault on a deputy-jailer in the execution of his office.
- (889) Resisting a sheriff in execution of his office. First count, assault on sheriff at common law.
- (890) Second count. The same under statute, specially setting out the execution which the sheriff was serving, etc.

- (891) Assault on a police officer of the city of Boston.
- (892) Assaulting a person specially deputized by a justice of the peace to serve a warrant.
- (893) Assaulting peace or revenue officers in the execution of their duties.
- (894) Resisting an officer of the customs in the discharge of his duty.

(846) *General frame of indictment for riot.*

That A. B. (b) late of, etc., C. D., late of, etc., E. F., late of, etc., with divers evil disposed persons, to the number of ten or more, to the jurors aforesaid as yet unknown, on, etc., with force and arms, (c) at, etc., did unlawfully, riotously, routously, and tumultuously assemble and meet together (d) to disturb the peace

(b) The indictment must aver the common action of at least three alleged rioters, though of these all but the defendant may be averred to be unknown. Wh. Cr. L. 8th ed. § 1546. On an indictment for a riot against three or more, if a verdict acquit *all but two*, and find them guilty, the finding is repugnant and void unless the indictment charge them with having made such a riot *together with divers other persons unknown*; for otherwise it appears that the defendants are found guilty of an offence whereof it is impossible that they should be guilty: for there can be no riot where there are no more than two persons. R. v. Sudbury, 1 Ld. Raym. 484; Wh. Cr. L. 8th ed. §§ 82, 1545. While women are amenable to the law as rioters, infants of either sex under the years of discretion are not. Hawk. b. 1, c. 65, s. 14. But where six were indicted for a riot, and two of them died before trial, two were acquitted, and two only found guilty, yet judgment was given upon this verdict; for, by Lord Mansfield, they must have been found guilty with one or both of those who had not been tried, or it could not have been a riot. R. v. Scott, 2 Burr. R. 1262.

(c) As to this allegation, see Com. v. Runnels, 10 Mass. 518; Wh. Cr. Pl. & Pr. § 271.

(d) This is essential as laying the foundation for riot. State v. Staleup, 1 Ired. 30. An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intent to do a thing which, if it were executed, would make them rioters, but neither actually executing it nor making a motion towards the execution of it. Hawk. b. 1, c. 65. See R. v. Birt, 5 C. & P. 154, and the charge of Tindal, C. J., at Stafford special commission, in 1842, C. & M. 661; Wh. Cr. L. 8th ed. § 1535.

"But," Hawkins adds, "this seems altogether much too narrow a definition. For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the queen's subjects, seems properly to be an unlawful assembly; as where great numbers complaining of a common grievance (*e. g.*, the inclosure of land in which they all claim a right of common, Hawk. b. 1, c. 65, s. 8), meet together armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly." Hawk. b. 1, c. 65, s. 9; 4 Bla. Com. 142. The meeting must be under such circumstances as would give firm and rational men reasonable ground to fear breach of the peace. Alderson, B., in R. v. Vincent, 9 C. & P. 91.

An assembly of a man's friends *in his own house*, for the defence of the possession thereof against those who threaten to make an unlawful entry therein, or for the defence of his person against those who threaten to beat him therein, is allowed by law; for a man's house is looked upon as his castle. Hawk. b. 1,

of the said commonwealth,^(e) and being so then and there assembled and gathered together,^(f) did then and there make great

c. 65, s. 10; 11 Mod. 116. But the like liberty, it has been held in England, is not allowed by the law to a man in defence of other property (*e. g.*, his close). *R. v. Bishop of Bangor*, 1 Russ. C. & M. 255; Dickinson's *Q. S. tit. Forcible Entry*. This, however, may be gravely questioned; and the better view is that a man is entitled to resist by adequate force any forcible and unlawful attack on his rights. Wh. Cr. L. 8th ed. §§ 97 *et seq.*

If a number of persons, being met together at a fair or a market, or any other lawful or innocent occasion, happen on a sudden quarrel to break the peace, it seems agreed that they are not guilty of a riot, but of sudden affray only, of which none are guilty but those who actually engage in it, because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly, without any previous intention concerning it. Hawk. b. 1, c. 65, s. 3; *State v. Snow*, 18 Maine, 346; *State v. Cole*, 2 McCord, 117. If the object of the assembly be lawful, it in general requires stronger evidence of the terror of the means to induce a jury to return a verdict of guilty, than if the object were unlawful; and it has been held that if a number of persons assemble for the purpose of abating a public nuisance, and appear with spades, iron crows, and the proper tools for that purpose, and abate it accordingly, without doing more, it is no riot (Dalt. ch. 137), unless threatening language or other misbehavior in apparent disturbance of the peace be at the same time used. *Ib.* Yet it is said, that, if persons innocently assembled together do afterwards, upon a dispute happening to arise among them, form themselves into parties with promises of mutual assistance, and then make an affray, they are guilty of a riot; because upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy, as if their first coming together had been on such a design. *Ib.* Wh. Cr. L. 8th ed. § 1542. If a person, seeing others actually engaged in a riot, join himself to them and assist them in their unlawful acts, he is as much a rioter as if he had at first assembled with them for the same purpose, since he has no pretence to contend that he came innocently into the company, but appears to have joined himself unto them with an intention to second them in the execution of their unlawful enterprise; and it would be endless as well as superfluous to examine whether every particular person engaged in a riot were, in truth, one of the first assembly or actually had a previous knowledge of the design of its movers. Hawk. b. 1, c. 65, s. 3.

To constitute a riot the assemblage must be accompanied with some offer of violence, either to the person of a man or to his possessions, as by beating him or forcing him to quit the possession of his lands or goods, or the like; and hence persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly. *Ib.* s. 4; Wh. Cr. L. 8th ed. § 1539. But where a band of men, consisting of eight or ten persons, disguised, paraded at night through the streets of a town, armed with guns or pistols, or both, and marched backward and forward through the streets, shooting guns and blowing horns, to the terror and alarm of inhabitants, it was held that the perpetrators were guilty of a riot, and a motion for a new trial was refused. *State v. Brazil*, Rice R. 257. However, in every riot there must be

(e) This is an adequate averment. *State v. Renton*, 15 N. H. 169.

(f) It is said that an unlawful purpose of assembly must be shown; but this seems doubtful, as a riot may occur though the original object of the meeting was lawful. See *R. v. Gulston*, 2 Ld. Raym. 1210.

noise, riot, tumult, and disturbance, and then and there unlawfully, riotously, routously, and tumultuously(*g*) remained and continued together, making such noises, tumults, and disturbances for a space of time, to wit, etc., to the great terror(*h*) and disturbance not only of the good subjects of the said common-

some circumstance, either of actual violence or force, or at least of an apparent tendency thereto, as is naturally apt to strike a terror into the people, as the show of arms, threatening speeches, or turbulent gestures (Ib. s. 4), for every such offence must be laid to the terror of the people. Ib.; *R. v. Hughes*, 4 C. & P. 373. Wh. Cr. L. 8th ed. §§ 1537 *et seq.* "And from hence," adds Hawkins, "it clearly follows that assemblies at wakes or other festival times, or meetings for exercise of common sports or diversions, as bull-baiting, wrestling, and such like, are not riotous. And from the same ground also it seems to follow that it is possible for three persons or more to assemble together with an intent to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a competent number of persons assemble together in order to carry off a piece of timber to which one of the company has a pretended right, and afterwards carry it away without any threatening words or other circumstances of terror." He adds, that by parity of reasoning, the assembling together in a peaceful manner to do a thing contrary to a statute (*e. g.*, to celebrate mass), and afterwards peacefully performing the thing intended, cannot be a riot. Hawk. b. 1, c. 65, s. 5.

Whether the proclamation from the riot act be read or not, the common law misdemeanor of riot remains; and magistrates, constables, and even private persons may disperse the offenders, and by force if it cannot be otherwise accomplished. *R. v. Fursy*, 6 C. & P. 81. It is sufficient to allege that the defendants assembled "with force and arms," and being so assembled committed acts of violence, without repeating the words "force and arms." *Com. v. Runnels*, 10 Mass. 518. Where the indictment charged in substance "that the defendants unlawfully, riotously, and routously assembled together to disturb the peace of the state, and being so assembled did make great noise, riot, tumult, and disturbance for a long space of time, to the great terror and disturbance of the people," etc., it was held conformable to the precedents in such cases, and sufficient. *State v. Brazil*, Rice R. 257. An indictment charging that the defendants, "with force and arms, at the house of one S. R., situate, etc., did then and there wickedly, maliciously, and mischievously, and to the terror and dismay of the said S. R., fire several guns," is good. No technical words are necessary, but it should appear that such force and violence were used as amount to a breach of the peace. All that the law requires in indictments of this kind is, that the facts shall be so stated as to show a breach of the peace, and not merely a civil trespass. *State v. Langford*, 3 Hawks, 381; *State v. Russell*, 45 N. H. 83.

(*g*) Technical terms are not essential in setting forth the disturbances produced by the defendants' misconduct. *State v. Russell*, 45 N. H. 83; *State v. Langford*, 3 Hawks, 381; *State v. Voshall*, 4 Ind. 589; *McWaters v. State*, 10 Mo. 167; though see *State v. York*, 70 N. C. 66. This repetition is, it seems, unnecessary. *Com. v. Runnels*, 10 Mass. 518.

(*h*) These words are essential to sustain a charge of riot; *R. v. Hughes*, 4 C. & P. 373; *R. v. Woolcock*, 5 C. & P. 516; but if the indictment omit them, and riotous acts, as cutting down fences, etc., are proved, it will still support a conviction of an unlawful assembly. *R. v. Cox*, 4 C. & P. 538; *Parke, B. Com. v. Runnels*, 10 Mass. 518; *State v. Whitesides*, 1 Swan, 88. "So, if after assembling for what if executed would make the parties rioters, they separate without carrying their purpose into effect." *R. v. Birt*, 5 C. & P. 154; *Patterson, J.*

wealth there inhabiting and residing, but of all the other citizens of the said commonwealth there passing and repassing in and along the public streets and common highways there situate, in contempt, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*It is usual to add a count for assault and battery, on which the defendant may be acquitted if convicted of riot. If an assault is included in the riot count, there can be a conviction of the assault, should the defendant be acquitted of the riot. Infra, 855.*)(i)

(847) *Affray at common law.*(j)

That J. S., etc., and J. W., etc., on, etc., with force and arms, at, etc., being unlawfully assembled together and arrayed in a warlike manner, then and there in a certain public street and highway there situate, unlawfully and to the great terror and disturbance of divers citizens of the said commonwealth then and there being, did make an affray, by then and there fighting with each other in the public street and highway,(k) in contempt of the said commonwealth and its laws, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(848) *Unlawful assembly and assault.*(l)

That J. D. *et al.*, together with divers other evil disposed persons, to the number of three and more (to the jurors aforesaid yet unknown), on, etc., with force and arms, etc., at, etc., did unlawfully, riotously, and routously assemble and gather together to disturb the peace of the said commonwealth; and so being then and there assembled and gathered together, in and upon one S. W., in the peace of God and the said commonwealth then and there being, unlawfully, riotously, and routously did make an assault, and him the said S. W. then and there unlaw-

(i) *R. v. Higgins*, 2 East, R. 5. *Shouse v. Com.*, 5 Barr, 83; Wh. Cr. L. 8th ed. § 1550; *infra*, 855.

(j) Archbold's C. P. 5th Am. ed. 708. Wh. Cr. L. 8th ed. § 1551.

(k) See *State v. Bonthal*, 5 Humph. 519; *State v. Priddy*, 4 Humph. 429.

(l) *Com. v. Dupuy*, 6 Penna. L. J. 223. Brightly R. 44; Wh. Cr. L. 8th ed. §§ 1376, 1431, 1556. The defendants were shown to have entered the Weccaco church in Philadelphia county, for the purpose of preventing a particular minister from officiating, and to have, when there, created considerable disturbance. A verdict of guilty was rendered under instructions from Kennedy, J.; the indictment being held to cover the offence.

fully, riotously, and routously did beat, wound, and ill-treat, so that his life was greatly dispaired of, and other wrongs to the said S. W. then and there unlawfully, riotously, and routously did, to the great damage of the said S. W., and against, etc. (*Conclude as in book 1, chapter 3.*)

(849) *Riot, and hauling away a wagon.(m)*

That R. S., late of, etc., together with four other persons, to the inquest aforesaid unknown, on, etc., at, etc., with force and arms, etc., riotously, routously, and unlawfully to disturb the peace of this commonwealth did assemble themselves together, and so being assembled and met together, a certain wagon of the value of thirty pounds, of the goods and chattels of S. B., then and there being found, then and there, with force and arms, etc., riotously, routously, and unlawfully did take and haul away, to the great damage of the said S. B., to the terror of the good citizens of this commonwealth, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(850) *Riot, in breaking the windows of a man's house.(n)*

That J. M. and P. C., with certain other wicked and ill-disposed persons to the number of twenty and upwards, to the inquest aforesaid unknown, on, etc., at, etc., with force and arms, etc., to wit, with stones, sticks, staves, and clubs, as rioters, routers, and disturbers of the peace of the commonwealth, riotously, routously, tumultuously, and unlawfully did assemble and gather themselves together, and so being assembled and gathered together the day and year aforesaid, at the county aforesaid, the doors and windows of the mansion-house of J. L., in the same county standing and being, with clubs, sticks, staves, and stones then and there riotously, routously, and unlawfully did break, pull down, spoil, and destroy, and the same mansion-house then and there riotously, routously, and unlawfully did enter, and the said J. L. did beat, wound, and ill-treat, and other harms then and there did to the said J. L., to the great damage of the said J. L., to the evil example, etc., to the great terror and disturb-

(m) Drawn in 1780 by Wm. Bradford, Esq., then attorney-general of Pennsylvania.

(n) Ib.

ance of all good citizens of this commonwealth, and against, etc. (*Conclude as in book 1, chapter 3.*)

(851) *Riot and disturbing a literary society, under Ohio statute.(o)*

That A. B., C. D., E. F., and G. H., and divers other evil disposed persons, to the number of three and more, whose names are to the deponent aforesaid unknown, on the twelfth day of May, in the year of our Lord one thousand eight hundred and fifty-two, at the county of Licking aforesaid, being lawfully assembled together, did then and there unlawfully, riotously, and routously agree together and with each other, unlawfully, riotously, routously, and with force and violence to disturb, annoy, and break up a certain literary society then and there lawfully assembled within a certain meeting-house there situate, for the purpose of mutual improvement and useful knowledge, and did then and there, in pursuance of said agreement, unlawfully, riotously, and routously, and with force and violence make a great noise and tumult, and then and there threw stones into and through the windows of said meeting-house, to the great damage and peril of the members of said literary society, and other good citizens in said meeting-house then and there being, and assembled for the purpose aforesaid. (*Conclude as in book 1, chapter 3.*)

(852) *Obstructing authorities, under Ohio statute.(p)*

That A. B., C. D., E. F., and divers other persons, to the deponent as yet unknown, to the number of three and more, on the day of in the year of our Lord one thousand eight hundred and in the county of aforesaid, did unlawfully, riotously, and routously assemble together, with intent then and there to do an unlawful act, with force and violence, against the (*here set forth a full charge for riot as in the forms which follow*); and that one M. N., then and there being a justice of the peace, in and for the county of aforesaid (*or other officer, see the statute*), legally authorized and duly qualified as such justice of the peace, then and there immediately, upon actual view,* did make proclamation aloud in the hearing of the said A. B.,

(o) Warren's C. L. 87.

(p) Warren's C. L. 83.

C. D., E. F., and the said other persons, to the deponent unknown, offenders as aforesaid, then and there, in the name of the state of Ohio, commanding the said A. B., C. D., E. F., and the said other persons, to the deponent unknown, then and there to disperse and depart to their several homes or lawful employments; † and the said A. B., C. D., E. F., and the said other persons, to the deponent unknown, then and there did not disperse and depart according to the command of the said justice of the peace, upon the proclamation aforesaid, but then and there unlawfully, riotously, and routously remained, to the number of three and more, whereupon the said justice of the peace, as aforesaid, then and there proceeded to call to his assistance O. P. and Q. R., peaceable and well disposed persons, then and there being, to take into custody and disperse the said A. B., C. D., E. F., and the said other persons, to the deponent unknown, then and there assembled as aforesaid; and then and there, while he the said M. N., justice of the peace, as aforesaid, was endeavoring, with the assistance of the said O. P. and Q. R., to take into his custody and disperse the said A. B., C. D., E. F., and the said other persons, to the deponent unknown, the said A. B. did then and there forcibly, unlawfully, and knowingly obstruct the authority aforesaid, in the performance of the duty aforesaid, that is to say, the said A. B. did then and there forcibly, unlawfully, and knowingly assault, beat, threaten, ill-treat, hinder, and obstruct, as well the said M. N., justice of the peace as aforesaid, as also the said O. P. and Q. R., then and there assisting the said justice of the peace, in manner aforesaid, contrary, etc.

(853) *Obstructing authorities and preventing a proclamation at a riot, under Ohio statute.(g)*

(Follow the last form to the * and then proceed as follows): did attempt and endeavor to make proclamation aloud, in the hearing of the said A. B., C. D., E. F., and the said other persons, to the deponent unknown, commanding the said A. B., C. D., E. F., and the said other persons, to the deponent unknown, to disperse and depart to their several homes or lawful employments, and then and there the said A. B. did unlawfully, forcibly and know-

ingly obstruct the authority aforesaid, that is to say, the said A. B. did then and there unlawfully, forcibly, and knowingly assault, beat, threaten, ill-treat, hinder, and obstruct the said M. N., justice of the peace as aforesaid, while he the said M. N., as such justice of the peace, was then and there attempting and endeavoring to make proclamation as aforesaid.

(854) *Riot, and refusing to disperse on proclamation being made, under Ohio statute.(r)*

(Follow No. 852 to the †, and then proceed as follows): and then and there the said A. B., and divers of the said other persons, to the deponent unknown, to the number of three and more, did not disperse and depart, as they were then and there required by the said proclamation and command of the said justice of the peace, so made as aforesaid, but the said A. B., and the said divers of the said other persons, to the deponent aforesaid unknown, to the number of three and more, then and there unlawfully, riotously, and routously continued and remained together after the said proclamation then and there made by the said justice of the peace, as aforesaid, for a long space of time, to wit, for the space of minutes.

(855) *Riot and pulling down a dwelling-house in the possession of prosecutor.(s)*

That W. S., J. S., H. S., and D. L., late of the county of Pike aforesaid, together with divers other persons, to the number of ten or more, to the jurors aforesaid as yet unknown, being rioters, routers, and disturbers of the peace of the commonwealth, on, etc., with force and arms, that is to say, with sticks, staves, clubs, and other hurtful weapons, at, etc., did unlawfully, riotously, routously, and tumultuously assemble and meet together, to the great terror of the peaceable people and inhabitants of this commonwealth, and to disturb the peace of the said commonwealth, and being so assembled and met together, one building and dwelling-house in the possession of J. W., of

(r) Warren's C. L. 83.

(s) *Shouse v. Com.*, 5 Barr. 83, where it was held, that under an indictment charging four with riot and riotous assault and battery, *one* may be convicted of an assault and battery, and the others acquitted generally. Wh. Cr. Pl. & Pr. §§ 245, 312.

the county of Pike aforesaid, did then and there riotously, routously, and unlawfully pull down, break down, destroy, and other wrongs to the said J. W. did then and there, to the great damage of the said J. W., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Add second count, giving riot and assault on prosecutor.*)

(856) *Riot and false imprisonment.(t)*

That G. S., *et al.*, on, etc., at, etc., with force and arms, etc., themselves as rioters and disturbers of the peace of our lord the now king, riotously, routously, and tumultuously, with an intent the peace of our said lord the now king to disturb and interrupt, did assemble and gather together, and so then and there being assembled and gathered together, then and there, with force and arms, etc., riotously, routously, and tumultuously in and upon a certain H. B., in the peace of God and our said lord the now king then and there being, an assault did make, and him the said H. B. then and there, without any lawful warrant or authority, did imprison and restrain of his liberty for the space of two hours, and then and there did compel and oblige him the said H. to pay the sum of two shillings current money of this province, and to give and deliver a certain red cow, being the proper cow of him the said H. B., unto the said G. S. to obtain his discharge and regain his liberty from the imprisonment aforesaid, to the evil example, etc., in contempt, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(857) *Disturbing the peace, etc., on land occupied by the United States for an arsenal.*

That C. S., *et al.*, all of Springfield, in said district of Massachusetts, on the day of June, etc., at said Springfield, on land belonging to the said United States, to wit, on land occupied for an army or arsenal, and for purposes connected therewith, out of the jurisdiction of any particular state of the said United States and within the jurisdiction of the said United States, together with divers other persons whose names are to the jurors aforesaid as yet unknown, to the number of four,

(t) This indictment was framed in 1759 by Mr. Benjamin Chew, the then attorney-general of Pennsylvania, and stood the test of a conviction.

being evil disposed and disorderly persons, with force and arms, did then and there unlawfully riotously, and routously assemble and gather themselves together to disturb the peace of the said United States, and being so assembled did then and there unlawfully, riotously, and routously, with force and arms, cut down and destroy and carry away a certain fence, the property of the said United States, and a certain small wooden building, the property of the said United States, and other wrongs then and there did, to the terror of the people there residing, being, and passing; in evil example, etc., and against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For corrupt interference with electors, see infra, 1016.*)

(858) *Disturbance of elections in Massachusetts.*(*u*)

That the inhabitants of W., on, etc., at, etc., aforesaid, were duly assembled in town meeting, for the choice of town officers for the political year then next ensuing; that a moderator was duly chosen, who called on the electors present to give in their votes for a selectman for the said political year then next ensuing; and that T. F. H., of in the county of on the day and year before mentioned, when the said moderator was presiding at the meeting, and was receiving the votes for a selectman, with force and arms, intending as much as in him lay to prevent the choice of said selectman according to the will of the said electors, and to interrupt the freedom of election, unlawfully and disorderly did openly declare that the old selectman should not be chosen, and attempted repeatedly to take from the box, which contained the votes of the electors, the votes of the electors (and so the jurors say, that the said T. F. H., on the day and year aforesaid, and at in the county aforesaid, in the public town meeting aforesaid, did behave himself disorderly and indecently, to the disturbance of the peaceable and quiet citizens then and there assembled for the purpose aforesaid, in violation of the rights of private suffrage); against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*u*) That part in brackets of this count was held in *Com. v. Hoxey* (16 Mass. 385) to comprehend an offence at common law, though the averments taken altogether were pronounced insufficient to sustain a sentence under the act of 1785, ch. 75, § 6.

(859) *Another form for same.(v)*

That heretofore, to wit, on the first day of June, in the year of our Lord at B. in the county of S., a town meeting of the inhabitants of said B., for the election of governor and lieutenant-governor of said commonwealth, and for senators for the district of S., was then and there duly holden. And the jurors aforesaid, upon their oath aforesaid, do further present, that C. D., late of B., in the county of S., laborer, afterwards, on the day and year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, in the town meeting aforesaid, did behave himself disorderly, by then and there (*here set out the facts according to the evidence*), against the peace, etc., and contrary to the form of the statute in such case made and provided.

(866) *Interrupting a judge of the election in Pennsylvania.*

That B. G., etc., on, etc., at, etc., designing and intending the due execution of the laws of this commonwealth to obstruct and prevent, with force and arms, etc., did threaten and use violence to the person of one J. B., he the said J. B. then and there being one of the judges of the election in the city of Philadelphia, at a general election held in and for the said city, on, etc., duly chosen, appointed, and sworn by virtue of an act of the general assembly of this commonwealth, entitled An act, etc., and in the due execution of his said office then and there also being, and then and there with threats and opprobrious language did interrupt the said J. B. in the execution of his office, and then and there did say to the said J. B., he the said J. B. still being in the due execution of his said office, "you (the said J. B. meaning) damned infernal rascal, I will see you for this another time," thereby meaning and intending to prevent and debar the said J. B. from proceeding in the execution of his said office, to the evil example, etc., and contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*).

(861) *Disturbing a religious meeting, under the Virginia statute.*(w)

That W. D., late of the county of Lewis, yeoman, on the sixth day of October, etc., with force and arms, at, etc., during religious worship, did on purpose, maliciously and contemptuously, disquiet and disturb a certain congregation of Methodists, being then and there lawfully assembled for the purpose of religious worship,(x) in contempt of public worship, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(862) *Same under Rev. Sts. Mass. ch. 130, § 171.*(y)

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, did wilfully interrupt and disturb a certain assembly of people there met for the worship of God, within the place of such meeting, to wit, within the meeting-house of the First Parish in B. aforesaid, in the county aforesaid, and during the performance of divine service

(w) See *Com. v. Daniels*, 2 Va. Cases, 402, where the form in the text was upheld. "This indictment," say the court, "sets forth the place where, the time when, as well as the denomination of religious persons to whom the disturbance was offered. It also charges the defendant with the offence in the very words of the statute. But it is urged, that as the time at which it is offered may be proved to have been different from that alleged, the want of an averment as to the means by which the disturbance was effected renders the indictment too uncertain to be supported. We do not doubt that it is a correct mode of drawing an indictment to charge the means by which the disturbance was caused, where those means can be ascertained; but when we find that an indictment similar to this, founded on an English statute, bearing a great resemblance to ours, has been acted on in the court of king's bench, and a judgment thereon rendered against sundry persons for the penalty prescribed by that statute, we are of opinion that the question is sufficiently settled.

"It may further be remarked, that there seems to be but little difference in point of *certainity* between the simple averment of a disturbance and disquieting in the words of the act, and the averment that the defendant did 'make divers great cries, noises, and disturbances, to disturb and disquiet, and did then and there disturb and disquiet,' etc., or this averment, 'that they did disquiet and disturb the congregation by then and there *talking, laughing, cursing, and swearing in a loud voice,*' both of which are to be found in approved precedents as copied by Chitty.

"On the whole matter, we are of opinion that it should be certified, 'that it is not necessary, in an indictment for disturbing a religious congregation, to set out the means by which the disturbance or disquieting was offered.'"

For authorities on this topic see Wh. Cr. L. 8th ed. § 1556.

(x) A variance in this averment may be fatal. *State v. Sherrill*, 1 Jones N. C. 508.

(y) Tr. & H. Prec. 177.

in said meeting-house, by then and there (*here set out the facts according to the evidence*); against the peace, etc., and contrary to the form of the statute in such case made and provided.

(863) *Disturbing a congregation worshipping in a church, at common law.*(z)

That J. D., etc., on, etc., being Sunday, with force and arms, at, etc., in the Ebenezer Baptist Church there, during the celebration of divine service, unlawfully, unjustly, and irreverently did disturb and hinder one J. V., then being the minister officiating in the said church, and then being in the discharge of his sacred functions and in the performance of divine service, in contempt of the laws of this state, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(864) *Disturbing same in a dwelling-house.*(a)

That on, etc., at, etc., a number of the citizens of said county were peacefully assembled at the house of J. W., in said county, for religious worship, and for the purpose of offering prayers to Almighty God, and the said persons being then and there so assembled together for the purpose aforesaid, and actually engaged in divine worship, P. R. S. and J. E. S., etc., well knowing the purpose of the said meeting, with force and arms, did then and there enter into said house, and by loud and abusive language then and there, with profane oaths and violent actions did disturb, wantonly and intentionally, the worship of the Al-

(z) *People v. Degey*, 2 Wheel. C. C. 135.

(a) *State v. Swink*, 4 Dev. & Bat. 368. "This case," said Ruffin, C. J., "is fully within the principle of *Jasper's case* (4 Dev. R. 323), which is that a congregation of people collected together for the purpose of divine service and engaged in the worship of Almighty God are protected by the laws and constitution of this state from wanton interruption or disturbance. To entitle them to that protection, it is not requisite that they should be assembled in a church, chapel, or meeting-house, as in this state, houses set apart by religious societies permanently for worship are generally and indifferently called. That would be the rule, if the indictment were framed upon a statute protecting churches, or people worshipping in churches. But under the enlarged sense of the constitution, a place of worship is constituted by the congregation of numerous worshippers thereat; for it is the right of conscience, the worship of the Supreme Being by his creatures, that is protected, and not merely the edifice. Our opinion therefore is, that although the assembly was at a private house—as, we think, must be intended upon this indictment—the defendants were guilty of a gross misdemeanor in molesting those persons there engaged in offering their common prayers, or united in other acts of worship to God."

mighty, and did disturb and molest the citizens then and there assembled for divine worship, to the great contempt of religion, to the common nuisance of the citizens of the state then and there being, and against, etc. (*Conclude as in book 1, chapter 3.*)

(865) *Dressing in a woman's clothes, and disturbing a congregation at worship.*(b)

That S. S., etc., being an injurious, profane, and irreligious man, on, etc., at, etc., did dress and disguise himself in woman's apparel, and being so as aforesaid dressed and disguised, then and there did go to the Lutheran Church, called Augustus Church, in the same township and county, with an intention then and there to interrupt and disturb divers of his majesty's liege subjects then and there assembled and gathered together to worship God, and then and there wickedly, profanely, and irreligiously did molest, vex, interrupt, and disturb a certain Henry A. Muhlenberg, rector of the said church, then and there preaching to divers of his majesty's liege subjects in the same church, he the said Henry A. Muhlenberg then and there being lawfully charged and qualified to preach in the same church, by reason of his care and function, and other harms to him the said Henry A. Muhlenberg then and there did, to the great displeasure of Almighty God, in contempt of his worship and religion, and of the laws of the land, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(836) *Going armed, etc., to the terror of the people, at common law.*(c)

That R. S. II., etc., on, etc., with force and arms, at, etc., did arm himself with pistols, guns, knives, and other dangerous and

(b) This indictment was framed in 1759 by Mr. Benjamin Chew, the then attorney-general of the province.

(c) *State v. Huntley*, 3 Iredell, 418. Gaston, J., said: "The argument is that the offence of riding or going about armed with unusual and dangerous weapons, to the terror of the people, was *created* by the statute of Northampton (2 Ed. III. c. 3); and that, whether this statute was or was not formerly in force in this state, it certainly has not been since the first of January, 1838, at which day it is declared in the Rev. Stats. (ch. 1 § 2) that the statutes of England and Great Britain shall cease to be of force and effect here. We have been accustomed to believe that the statute referred to did not *create* this offence, but provided only special penalties and modes of proceeding for its more effectual suppression; and of the correctness of this belief we can see no reason to doubt.

unusual weapons, and being so armed did go forth and exhibit himself openly, both in the daytime and in the night, to the

All the elementary writers who give us any information on the subject concur in the representation; nor is there to be found in them, as far as we are aware of, a *dictum* or intimation to the contrary. Blackstone states, that 'the offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land; and is *particularly* prohibited by the statute of Northampton (2 Ed. III. c. 3). upon pain of forfeiture of the arms and imprisonment during the king's pleasure.' 4 Bla. Com. 149. Hawkins, treating of offences against the public peace, under the head of 'Affrays,' pointedly remarks, 'but granting that no *bare words* in judgment of law carry in them *so much terror as to amount to an affray*, yet it seems certain that in some cases there may be an affray where there is no actual violence, as where a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people, *which is said to have been always an offence at common law*, and *strictly* prohibited by many statutes.' Hawk. P. C. b. 1, c. 28, s. 1. Burn and Tomlins inform us, that this term 'affray' is derived from the French word '*effrayer*,' to affright, and that *anciently it meant no more*, 'as where persons appeared with armor or weapons not usually worn, to the terror of others.' Burn, Verb. 'Affray.' It was declared by the chief justice in Sir John Knight's case, that the statute of Northampton was made in affirmance of the common law. 3 Mod. Rep. 117. And this is manifestly the doctrine of Coke, as will be found on comparing his observations on the word 'affray,' which he defines (3 Inst. 158), 'a public offence to the terror of the king's subjects, and so called because it affrighteth and maketh men afraid, and is inquirable in a *leet* as a common nuisance,' with his reference immediately thereafter to this statute and his subsequent comments on it (3 Inst. 160), where he cites a record of the 29th year of Ed. I., showing what had been considered the law *then*. Indeed, if those acts be deemed by the common law crimes and misdemeanors which are in violation of the public rights, and of the duties owing to the community in its social capacity, it is difficult to imagine any which more unequivocally deserve to be so considered than the acts charged upon this defendant. They attack directly that public order and sense of security which it is one of the first objects of the common law, and ought to be of the law of all regulated societies, to preserve inviolate; and they lead almost necessarily to actual violence. Nor can it for a moment be supposed that such acts are less mischievous here, or less the proper subjects of legal reprehension, than they were in the country of our ancestors. The bill of rights in this state secures to every man indeed the right to 'bear arms for the defence of the state.' While it secures to him a *right* of which he cannot be deprived, it holds forth the *duty* in execution of which that right is to be exercised. If he employ those arms which he ought to wield for the safety and protection of his country to the annoyance and terror and danger of its citizens, he deserves but the severer condemnation for the abuse of the high privilege with which he has been invested.

It has been remarked that a double-barrelled gun, or any other gun, cannot in this country come under the description of 'unusual weapons,' for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an 'unusual weapon' wherewith to be armed and clad. No man amongst us carries it about with him as one of his every-day accoutrements—as a part of his dress—and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving state as an appendage of manly equipment. But although a gun is an 'unusual weapon,' it is to be remembered that the carrying of a gun, *per se*, constitutes no offence. For any lawful purpose, either of business or amusement, the citizen is at perfect liberty to carry his gun. It is the

good citizens of Anson aforesaid, and in the said highway and before the citizens aforesaid, did openly and publicly declare a purpose and intent, one J. H. R. and other good citizens of the state, then and there being in the peace of God and the state, to beat, wound, kill, and murder, which said purpose and intent the said R. S. H., so openly armed and exposed and declaring, then and there had and entertained, by which said arming, exposure, exhibition, and declarations of the said R. S. H., divers good citizens of the state were terrified, and the peace of the state endangered, to the evil example, etc., to the terror of the people, and against, etc. (*Conclude as in book 1, chapter 3.*)

(867) *Carrying a dangerous weapon, under Indiana Rev. Sts.(d)*

That on, etc., at, etc., and on divers other days and times, etc., A. B. did then and there unlawfully carry concealed in his pocket, a certain dangerous weapon, namely, a certain pistol, he not being a traveller, contrary, etc. (*Conclude as in book 1, chapter 3.*)(e)

(868) *Maliciously firing guns into the house of an aged woman, and killing a dog belonging to the house.(f)*

That R. T. and J. L., late of, etc., on, etc., with force and arms, at the house of one S. R., an aged woman, situate in the county aforesaid, did then and there wickedly, mischievously, and maliciously, and to the terror and dismay of the said S. R., fire several guns, and then and there did shoot and kill a dog belonging to said house, without any legal authority, against, etc. (*Conclude as in book 1, chapter 3.*)

wicked purpose and the mischievous result, which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm a peaceful people." See, on this topic, Wh. Cr. L. 8th ed. § 1553.

(d) *State v. Duzan*, 6 Blackf. 31. "We think this indictment is good. The objection that the pistol is not stated to have been loaded is insufficient. The statute says, 'that every person, etc., who shall wear or carry any dirk, pistol, sword in cane, or other dangerous weapon concealed, shall,' etc. Rev. Stat. 1838, p. 217. The statute does not require that the pistol should be loaded."

(e) See Wh. Cr. L. 8th ed. § 1557.

(f) Sustained in *State v. Langford*, 3 Hawks, 381. See for similar precedents, *supra*, 485, note.

(869) *Breach of peace, tumultuous conduct, etc., in Vermont.*(g)

That H. B., etc., on, etc., and on divers other days and times between that date and the time of this presentment, with force and arms, at, etc., did greatly disturb and break the peace by tumultuous and offensive carriage, and by threatening, quarrelling, and challenging, and by lying in wait for one S. B., and by threatening to kill the said S. B., to the great disquiet, terror, and alarm of the said S. B., and other good citizens of this state, and other wrongs then and there did, to the evil example, etc., contrary, etc. (*Conclude as in book 1, chapter 3.*)

(869a) *Furious driving, under English statute.*

That J. S., etc., on, etc., at, etc., being then a coachman, and then having charge of a certain carriage and vehicle called an omnibus, unlawfully did, by the wanton and furious driving of the said carriage and vehicle by him the said J. S., cause certain bodily harm to be done to one J. N., against, etc.(h) (*Conclude as in book 1, chapter 3.*)

(869b) *Against horse-car conductor for over-driving, etc.*

The jurors of the people of the state of New York, in and for the body of the city and county of New York, upon their oath present: That George W. Tinsdale, late of the first ward of the

(g) This count was sustained in *State v. Benedict*, 11 Vt. 237. Redfield, J. —“Whatever was once thought upon this subject, it is now well settled, that mere threats in words not written, are not an indictable offence at common law. It is said in many of the books that it was formerly indictable. This might have been and probably was the case at the time the statute in this state in relation to the subject was passed. It is there said, ‘if any person shall in any manner disturb or break the peace, by tumultuous and offensive carriage, by threatening, quarrelling, challenging, assaulting, beating, or striking any other person,’ he shall be liable, on conviction, to pay such fine as ‘the court, taking into consideration the situation of the party smiting or being smitten, the instrument and danger of the assault, the time, place, and provocation, according to the nature of the offence, shall adjudge.’

“There is another reason why here, more than at common law, mere threats should be considered an offence punishable by indictment. At common law the person threatened can swear the peace against the offender, and obtain redress in that way, by obtaining security against the commission of the offence threatened. This mode of primitive justice has not been much resorted to, if indeed it exists in this state. It is believed the legislature intended the remedy here given to supersede its necessity. The sending of threatening letters is an offence of a different character.”

(h) Arch. C. P. 19th ed. p. 735.

city of New York, in the county of New York aforesaid, he then and there being a conductor of a passenger car, on the Bleecker Street and Fulton Ferry railroad of the city of New York, and Arthur Taggart, late of the same place, he then and there being driver of said passenger car of said railroad, on the second day of January, in the year of our Lord one thousand eight hundred and sixty-eight, at the ward, city, and county aforesaid, with force and arms, did unnecessarily overload and procure said passenger car to be overloaded, then and there being attached to said passenger car two living creatures, to wit, two horses; by means whereof, on a certain portion of the route of the said railroad, the horses so attached to said passenger car were unable to draw said passenger car, but were, by reason of the premises aforesaid, overloaded, overdriven, tortured, and tormented; against, etc.(i) (*Conclude as in book 1, chapter 3.*)

(870) *Refusing to aid a constable in quelling a riot.*(j)

That heretofore, to wit, on, etc., at, etc., divers disorderly persons, to the number of twenty and more, to the jurors aforesaid as yet unknown, then and there did unlawfully, riotously, and routously assemble and gather together to disturb the peace of our lady the queen, and being then and there so unlawfully, riotously, and routously assembled and gathered together, did commit divers outrages, to the great terror of all the liege subjects of our said lady the queen, as well inhabiting and residing as passing and repassing there, and against the peace of our said lady the queen, her crown and dignity; and the jurors aforesaid do further present, that one D. H., then and there being a constable of and for the county aforesaid, and in the due execution of his said office, then and there did endeavor to prevent and restrain the said persons so assembled and committing such outrages as aforesaid, from continuing to make the said riot and breach of the peace, and him the said D. H., being such constable as aforesaid, and so acting according to the duty of his said office, the said persons so unlawfully, riotously, and routously assembled and gathered together and disturbing the peace

(i) *People v. Tinsdale*, 10 Abbott's Prac. R. 374. (Hackett, Recorder, 1868.)

(j) *R. v. Brown*, 1 C. & M. 175. Verdict, guilty. For notice of this case see Wh. Cr. L. 8th ed. § 1555.

of our said lady the queen, with force and arms did then and there violently, forcibly, and unlawfully resist and obstruct in the execution of his duty; and that he the said D. H., being such constable as aforesaid, thereupon, being then and there, on the day and in the year aforesaid, in the parish aforesaid, in the county aforesaid, did in his proper person apply to one T. B., late, etc., being then and there present, and in her majesty's name did then and there, on the day and in the year aforesaid, at, etc., charge and require the said T. B. to aid and assist him, the said D. H., in the execution of his office and the preservation of the peace of our said lady the queen, and in securing the said persons so unlawfully, riotously, and routously assembled to disturb the queen's peace as aforesaid, still then and there continuing to resist and obstruct the said D. H. in the due execution of his office, in order to their being dealt with according to law; yet he the said T. B., not regarding his duty in this respect, and then and there well knowing the said D. H. was such constable as aforesaid, and so in the execution of his duty as aforesaid, to wit, on, etc., at, etc., with force and arms, unlawfully, obstinately, and contemptuously did neglect and refuse to aid and assist the said D. H. for the purpose and on the occasion aforesaid, in the manner he the said T. B. was requested, charged, and commanded to do as aforesaid, or in any other manner whatever, contrary to his duty in that behalf, in manifest contempt of our said lady the queen and her laws, to the great hinderance of justice, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(871) *Refusing to assist a constable in carrying offender to prison.*(k)

That whereas a certain E. E., late of Philadelphia county aforesaid, spinster, on, etc., at, etc., was duly arrested, on suspicion of having feloniously taken, stolen, and carried away eight yards of cambric, etc., of the goods and chattels of a certain D. M., and then and there did appear in her proper person before E. T., Esq., one of his majesty's justices of the peace in the said county of Philadelphia to keep, and also divers trespasses,

(k) This form was prepared in 1760 by Mr. Benjamin Chew, then attorney-general of Pennsylvania.

felonies, and other misfeasances in the said county perpetrated, to hear, try, and determine, assigned, to be examined touching the said felony; and whereas the aforesaid E. T., the day and year aforesaid, at the county aforesaid, one of his majesty's justices as aforesaid being, did make his warrant of commitment in writing, with the seal of him the said E. T. sealed, bearing date the day and year aforesaid, to the sheriff or keeper of the common gaol of the county of Philadelphia directed, by which it was commanded the said sheriff or keeper of the common gaol aforesaid, that he should receive into his custody the body of the said E. E., who was charged with the felony aforesaid, and her safely keep, till she should be from thence delivered by due course of law, which said warrant of commitment, with the body of her the said E. E., the said E. T. then and there did deliver to a certain P. S., one of the constables of the township of Lower Dublin, in the county aforesaid, then and there being, by him to be carried to the common gaol of the said county, and there to be safely delivered to the sheriff of the said county or the keeper of the gaol of the said county, in due form of law, and the aforesaid P. S. then and there did take and receive the said E. E. into his custody, and the said P. S., one of the constables as aforesaid then and there being, then and there did require, and in the name of our said lord the now king did command, a certain J. W., late of the county of Philadelphia, farmer, then and there to aid and assist him the said P. S. to carry and convey the body of the said E. E. to the common gaol of the county of Philadelphia: Nevertheless the said J. W., to aid and assist him, the said P. S., to carry and convey the body of the said E. E. to the common gaol of the said county of Philadelphia, contemptuously did refuse and deny, to the manifest contempt of our said lord the now king and his laws, to the evil and pernicious example of all others in such case offending, and against, etc. (*Conclude us in book 1, chapter 3.*)

(872) *Assault and rescue.*(l)

That on, etc., at, etc., J. II., Esq., then and still being one of the justices of this commonwealth, the peace in the said county

(l) Drawn in 1786, by Mr. Wm. Bradford, attorney general.

(*Rescue by third persons.*) Rescue is where a third person procures or assists the escape of a prisoner; and this is at the least criminal, in the same degree

to keep, assigned, and also to hear and determine divers felonies and misdemeanors in the same county committed, made his warrant in writing under his hand and seal, directed to the high sheriff of the said county, and to any constable therein, commanding him to take and arrest the body of a certain D., and him to bring before the said J. H., or some other justice of the peace, there to answer a certain charge of forcibly opposing one C., constable of the said city, in the execution of his duty before that time made, which warrant was delivered to J. W., then one of the constables for the city of Philadelphia, in the county aforesaid, to be executed in due form of law, by virtue of which same warrant the aforesaid J. W., afterwards, to wit, on, etc., at, etc., aforesaid, and within the jurisdiction of this court, did take and arrest the body of the said D. in the warrant aforesaid named, and him the said D. in his custody, by virtue of the said warrant then and there had; and that A. B. and C. D., both late of the county aforesaid, yeomen, afterwards, to wit, on, etc., with force and arms, etc., at, etc., in and upon the same J. W., then and there as aforesaid being one of the constables of the same city, in the peace of God and this commonwealth, and in the execution of his said office then and there being, with force and arms, an assault did make, and him the said D., out of the custody of the said J. W., and against the will of the said J. W., then and there, with force and arms, unlawfully did rescue and put at large, to go where he would, and that the said A. B. and C. D. the said D., out of the custody of the said J. W., and against the will of the said J. W., then and there, with force and arms, did rescue and put at large, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

with the act of a party breaking prison. In case of treason, a stranger rescuing a traitor is himself guilty of treason (Hawk. b. 2, c. 21, s. 7); in case of felony, he is guilty of felony, if the principal be convicted; and in all cases he is guilty of a high misdemeanor at common law, for which he may be prosecuted, whatever may be the fate of the party whom he aided. Hawk. b. 2, c. 21, s. 6. At common law, unsuccessful attempts to procure the escape of a felon were not felonies (*R. v. Tilley*, 2 Leach, 671; *R. v. Stanly*, R. & R. C. C. 432); though where the attempt is any degree successful, it becomes indictable. *People v. Tompkins*, 9 Johns. 70. Wh. Cr. L. 8th ed. § 1680. See, as to forms for same, 1946, etc.

(873) *Against two for a rescue, one of them being in custody of an officer of the marshal's court upon process, etc.(m)*

That on, etc., our said lord the king, by his writ issued out of the court of our said lord the king of his palace of Westminster, under the seal of the said court, bearing date the same day and year aforesaid, directed to the bearers of the verges of the household of our said lord the king, officers and ministers of the court of our said lord the king of his palace of Westminster and every of them, did command them and every of them, that they should take, or one of them should take, by their bodies, R. A. and W. C., if they should be found within the jurisdiction of the court aforesaid, and them safely keep, so that they might have, or one of them might have, their bodies before the judges of the court aforesaid, at the next court of the palace of our said lord the king of Westminster aforesaid, on, etc., then next following, to be holden at S., in the county of Surrey, to answer T. W. of a plea of trespass upon the case, to the damage of the said T. W., of pounds, which said writ afterwards, and before the delivery thereof, etc., which same writ so indorsed, afterwards, and before the return of the same, to wit, on, etc., at, etc., and within the jurisdiction of that court, was delivered to one G. N., then one of the bearers of the verges of our said lord the king, officers and ministers of the court of our said lord the king, to be executed in due form of law, by virtue of which said writ, the said G. N., afterwards, and before the return thereof, to wit, on, etc., at, etc., and within the jurisdiction of that court, did take and arrest the body of the said R. A. in the writ aforesaid named, and him the said R. A. in his custody, by virtue of the said writ, then and there had; and that the said R. A., late of the parish aforesaid, in the county aforesaid, yeoman, and C. D., late of same, blacksmith, afterwards, to wit, on, etc., with force and arms, at, etc., in the county and within the jurisdiction aforesaid, in and upon the said G. N., then and there as aforesaid being one of the bearers of the verges of the household of our said lord the king, officers and ministers of the court aforesaid, and having the said R. A. in

custody for the cause aforesaid, and in the due execution of his said office then and there also being, did make an assault, and him the said G. N. then and there did beat, wound, and ill-treat; and that the said C. D. him the said R. A., out of the custody of the said G. N., and against the will of the said G. N., then and there, with force and arms, unlawfully did rescue and put at large to go whithersoever he would; and that the said R. A., himself out of the custody of the said G. N., and against the will of the said G. N., then and there, with force and arms, unlawfully did rescue and escape and go at large whithersoever he would; to the great hinderance and obstruction of justice, in contempt of our said lord the king and his laws, to the great damage of the said G. N., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Add a count for a common assault.*)

(873a) *Rescue of felon from constable.*

That on, etc., at, etc., I. S., being one of the constables of, etc., brought one I. N. before A. C., Esq., then and there being (*stating office*), and the said I. N. was there charged (*stating charge*); and the said I. N. was then examined before the said A. C., the justice aforesaid, touching the said offence so to him charged as aforesaid; upon which the said A. C., the justice aforesaid, did then and there make a certain warrant (*stating warrant*), which said warrant afterwards, to wit, on the day and year aforesaid, was delivered to the said I. S., then and there being one of the constables of the parish aforesaid, and then and there having the said I. N. in his custody for the cause aforesaid; and the said I. S. was then and there commanded by the said A. C., the justice aforesaid, to convey the said I. N. without delay to the said gaol, etc., and to deliver him to the keeper, etc., together with the warrant aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said I. N. and I. T., etc., afterwards, and whilst the said I. N. was in the custody of the said I. S., under the said warrant as aforesaid, and whilst the said I. S. was conveying the said I. N., under and by virtue of the said warrant, etc. (*stating destination*), in and upon the said I. S., then and there being constable as aforesaid, and then lawfully having the said I. N. in his custody by virtue of the said

warrant, etc., did make an assault, and him the said I. S. did then beat, wound, and ill-treat ; and that the said I. T. him the said I. N., out of the custody of the said I. S., and against the will of him the said I. S., then unlawfully and forcibly did rescue and put at large, to go whithersoever he would ; and that the said I. N. himself out of the custody of the said I. S., and against the will of him the said I. S., then unlawfully and forcibly did rescue and put at large, to go whithersoever he would ; to the great hinderance of justice, etc., in the contempt, etc., against, etc.(n)

(874) *Assault and rescuing goods seized as a distress for rent after a fraudulent removal.(o)*

That on, etc., and continually afterwards, until, etc., one M. E. did hold of one J. W. a certain room or apartment, with the appurtenances, being part and parcel of a certain messuage or dwelling-house of him the said J. W., situate, etc., by virtue of a certain demise thereof made by and from the said J. W. to the said M. E. at and under the weekly rent of fifteen shillings, reserved and made payable by the said demise to the said J. W. on the said, etc., and that on the said, etc., the said sum of fifteen shillings was due in arrear and unpaid for the rent aforesaid, by virtue of the said demise to him the said J. W. And the jurors, etc., do further present, that the said M. E., on, etc., at, etc., aforesaid, did fraudulently and clandestinely convey and carry off from the said demised premises his goods and chattels, that is to say, one pewter dish, etc. (*here set out the goods*), of the value of the said sum of fifteen shillings, with intent to prevent the said J. W., the lessor aforesaid, from distraining the same for the said rent so reserved, in arrear due and unpaid as aforesaid ; whereupon the said J. W., afterwards, and within the

(n) Arch. C. P. 19th ed. p. 861.

(o) Dickinson's Q. S. 6th ed. 370. See Stark. C. P. 389. By 8 Hen. VII. c. 14, it is enacted, that in case any lessee of any messuages, tenements, etc., on demise whereof any rents shall be reserved or made payable, shall fraudulently and clandestinely convey and carry off from such demised premises his goods and chattels, with intent to prevent the landlord or lessor from distraining the same for arrears of the rent, the lessor or landlord may take and seize such goods and chattels wherever they may be found, as a distress, and sell them in the same way as if they had been regularly distrained on the premises ; and by 2 Geo. II. c. 19, s. 1, the time is enlarged to thirty days.

space of five days next ensuing the said conveying and carrying off the said goods, to wit, on, etc., at, etc., aforesaid, did find the said goods and chattels, and the said goods and chattels so found, did then and there, in due form of law seize as a distress for the said rent so due and in arrear as aforesaid, and being also then unpaid, and the said goods and chattels in his custody and possession, for the cause aforesaid, then and there had; and that the said M. E., late of, etc., aforesaid, and S. his wife, afterwards, to wit, on, etc., last aforesaid, at, etc., aforesaid, in and upon the said J. W., in the peace of God and our said lady the queen then and there being, did make an assault, and the said goods and chattels (so as aforesaid, for the cause aforesaid, taken and seized) out of the possession, and against the will, of the said J. W. unlawfully and injuriously did take, rescue, and carry away (the said sum of fifteen shillings so due for rent as aforesaid, or any part thereof, not being then paid or satisfied to the said J. W.), against etc. (*Conclude as in book 1, chapter 3.*)

(*Add a count for a common assault.*)

(875) *Assault on an officer of justice, and taking from him goods which had been seized by him on an execution.*(p)

That on, etc., one J. D., then being one of the deputies of the sheriff of said county of Suffolk, by virtue of a certain writ of attachment to him directed, purchased out of the clerk's office of the court of common pleas for the county of Suffolk, in due form of law attached certain goods and chattels, and placed the same in the care, keeping, and custody of one T. J. S., and the said T., then being lawfully in possession of the goods and chattels aforesaid, under the authority and deputation of the said J. D., in his capacity of deputy of the said sheriff, and while the said T. was so in possession, they the said D. D. B., A. K., and H. H. F., at said Boston, on, etc., with force and arms, in and upon said T. made an assault, and him the said T. then and there beat, bruised, and evil-treated, and with force and a strong hand deprived the said T. of the care, custody, and possession of the goods and chattels aforesaid, and other wrongs and in-

(p) See *Com. v. Kennard*, 8 Pick. 133, in which case the indictment in the text was used. The defendant met it by a special plea, which will be found *infra*, 1159. See Wh. Cr. L. 8th ed. §§ 100, 501, 624.

juries to said T. then and there with like force did, against, etc.
(*Conclude as in book 1, chapter 3.*)

(876) *Rescuing goods distrained for rent of a house.*(*q*)

That on, etc., one M. D., in due form of law, did take and distrain one oak table, of the value of ten shillings, and one feather bed, of the value of thirty shillings, and one clock, of the value of two pounds, of the goods and chattels of one W. II., laborer, then being in a certain dwelling-house of the said M. D., situate in etc., aforesaid, which same distress was taken by him the said M. D. for the sum of five pounds, being then due for rent, for one whole year, in arrear from the said W. II. to him the said M. D. for the house aforesaid; and that the said M. D. the said goods and chattels then and there had and lawfully detained in his custody for the cause aforesaid. And the jurors, etc., do further present, that N. W., late of, etc., afterwards, to wit, on, etc., with force and arms, at, etc., aforesaid, the said goods and chattels, so as aforesaid by the said M. D. taken and distrained, and in the custody of him the said M. D. then and there lawfully being, from and out of the custody and against the will of him the said M. D., then and there unlawfully and injuriously did rescue, take, and carry away (the said sum of five pounds for the rent in arrear as aforesaid being due, nor any part thereof being then paid), against, etc. (*Conclude as in book 1, chapter 3.*)

(878) *Prison breach.*(*r*)

That on, etc., at the district aforesaid, R. P., Esq., judge of the district court of the said United States, issued his warrant under his hand and seal to W. N., Esq., marshal of the said district, directed, and the said warrant to the said marshal then and there delivered, wherein and whereby the said marshal was directed that he take the body of J. E., late of Northampton

(*q*) Dickinson's Q. S. 6th ed. 370.

The civil remedy by 2 Wm. & Mary (sess. 1, c. 5, s. 4), whereby treble damages and costs are recoverable for pound breach or rescue of goods distrained, is the usual remedy resorted to, but nevertheless, an indictment will lie at all events, if breach of the peace occurs. Ibid.

(*r*) U. S. v. Eyerman, U. S. circuit court for Pennsylvania, 1799. The bill was drawn by Mr. Rawle, then district attorney of the United States, and was sustained after a verdict of guilty.

county, in the same district, yeoman, and bring him before the said R. P., to find sufficient sureties for his the said J. E.'s personal appearance at the circuit court of the said United States for the middle circuit and district aforesaid, at the then next stated session thereof, to be holden at Philadelphia, on, etc., to answer a charge of being concerned in an unlawful combination and conspiracy to impede the operation of a law of the said United States, entitled "An act to lay and collect a direct tax within the United States," and to such other matters as should in behalf of the said United States be then and there objected against him, and further to be dealt with according to law. Which said W. N., the marshal aforesaid, afterwards, that is to say, on the seventh day of March, in the year aforesaid, at the district aforesaid, by virtue of the said warrant, did arrest and take him the said J. E., and him the said J. E. in his custody, by virtue of the said warrant, then and there had. And the grand inquest aforesaid, upon their respective oaths and affirmations, do further present, that the said J. E., on, etc., at the district aforesaid, so being in the lawful custody of him the said W. N., Esq., marshal aforesaid, with force and arms, and against the will of the said W. N., prison did break, and out of the said custody of the said W. N., the said marshal did liberate himself and go at large, in contempt of the said United States and the laws thereof and the administration of justice therein, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(879) *Assault on a constable, etc.*

That A. B., on, etc., in and upon one E. F. (then being one of the constables of the said parish of C., in the said county of D.,^(s) in the peace of God and the said, etc., and in the due execution of his said office then and there also being) did make an assault, and him the said E. F. then and there did beat, wound, and ill-treat, so that his life was greatly despaired of, and other wrongs, etc.

(*Add a count for a common assault.*)

(s) See *State v. Downer*, 8 Vt. 424.

This is a sufficient allegation that he was a constable (*Stark. C. P.* 178, 179, 187, 188); and the allegation would be satisfied by evidence that he acted as such. *Gordon's case*, *Leach*, 581; 4 T. R. 366; 5 T. R. 607; 3 T. R. 632.

(880) *Another form for same.(t)*

That R. W., late of, etc., on, etc., with force and arms, at, etc., an assault did make upon J. K., of, etc., then and ever since a constable of said town, etc., legally authorized and duly qualified to discharge and perform the duties of said office, and being then and there in the due and legal execution of the same, and him the said J. K. did then and there beat, abuse, and ill-treat, and in the due and lawful execution of said office did then and there unlawfully and knowingly obstruct, hinder, resist, and abuse, by assaulting, beating, threatening, pushing, and refusing to submit to the lawful authority of him the said K., so as aforesaid then and there in the lawful execution of his said office, against, etc., of evil example, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(881) *Second count. Averring arrest of defendant by said constable, etc., and proceedings before a justice of the peace, upon which defendant was committed in default of bail, charging resistance by defendant to the officer when detaining him in custody.*

That on, etc., the said R. W., together with J. B., C. L. B., and H. H., at, etc., were, by J. K., of the said town of New Haven, then and ever since a constable of said town of New Haven, legally authorized and duly qualified to execute and perform the duties of said office, at said town of New Haven, and within the precincts of the said K., constable as aforesaid, lawfully arrested and brought before T. B., Esq., then and ever since a justice of the peace for New Haven county, duly qualified and sworn, residing in said town of New Haven, at his office in said town of New Haven, by virtue of a warrant then in the hands of said K., issued by the said T. B., Esq., as such justice, on the complaint of J. C. H., Esq., of said town of New Haven, then and there a grand juror of said town, charging them the said R. W., J. B., C. L. B., and H. H., with the crime of theft, to wit, at New Haven aforesaid, which warrant was directed to the sheriff of New Haven county, or his deputy, or either of the

(t) This indictment was prepared by Mr. Kimberly, state's attorney in New Haven, in 1837, and was sustained by the court on motion for arrest of judgment. See, for other forms for same, *infra*, 882, etc.

constables of the town of New Haven, in said county, commanding them to arrest the bodies of the said R. W., J. B., C. L. B., and H. H., and them forthwith have before the said T. B., Esq., a justice of the peace for said county, or some other justice of the peace for said county, in said town of New Haven, to answer to the charges alleged against them in the complaint aforesaid, of the said J. C. H., grand juror as aforesaid, and be dealt with therein as the law directs; and the said R. W., J. B., C. L. B., and H. H. were then and there, by the said J. K., as constable as aforesaid, and in the due execution of his said office, by virtue of said warrant, detained and held in custody before said Justice B., to wit, at New Haven aforesaid, whilst holding a justice court for the examination and trial upon the charge aforesaid, and the said T. B., Esq., so holding a justice court as aforesaid, for the purposes aforesaid, having inquired into the allegations contained in said complaint, and finding it necessary to adjourn said trial to a future time, did thereupon consider and order that they the said R. W., J. B., C. L. B., and H. H. should become bound, each of them, with surety in a recognizance in the sum of seventy-five dollars each to the treasurer of the county of New Haven, that they should respectively appear before him the said Justice B., on the, etc., to which time said trial was by said justice adjourned, then and there to answer to said complaint, and in default thereof to be committed to the New Haven county jail; and the said W., B., B., and H., having neglected and refused to become bound, and while so in the custody of the said K., as constable as aforesaid, and while the said K. was so in the execution of his said office as constable as aforesaid, endeavoring to hold and detain them, and preparing to commit them to the keeper of the jail in said county, in compliance with the order of said court, so as aforesaid holden by the said T. B., Esq., justice of the peace for New Haven county as aforesaid the said R. W. did then and there, with force and arms, at the town of New Haven aforesaid, well knowing all the facts aforesaid, wilfully and knowingly resist, hinder, obstruct, and abuse the said K., so a constable of the town of New Haven as aforesaid, and so in the execution of his said office as aforesaid, by threatening, assaulting, striking, and

pushing him the said K., and refusing to submit to his lawful authority, against, etc. (*Conclude as in book 1, chapter 3.*)

(882) *Resistance to a constable employed in the arrest of a fugitive charged with larceny.*(u)

That H. G. T., F. S., W. W., H. H. S., and R. W., etc., together with divers others, to the number of fifty, evil disposed persons, whose names are to this inquest as yet unknown, on, etc., at, etc., with force and arms, did unlawfully, riotously, and routously assemble together to disturb the peace, and being so assembled, in and upon one J. S., then and there being one of the constables of the city of Boston, in the due and lawful discharge of the duties of his office as constable of said city, being in the service of a legal precept to him directed, and having then and there lawfully one G. L., otherwise called A. M., in his custody as a prisoner, to be examined on a charge of larceny by the police court of said city, according to a certain lawful precept to him directed and issued by said police court under its seal, upon a complaint made and sworn to according to law, said police court then and there having lawful jurisdiction in the premises, and said S. then and there being in the peace of the commonwealth, an assault did make unlawfully, riotously, and routously, and him the said S. did then and there unlawfully, riotously, and violently beat, wound, and ill-treat, and resist, hinder, and obstruct him in the discharge of the duties of his office of constable, and then and there unlawfully, riotously, and routously did attempt to rescue said L. from the custody of said S., and did then and there unlawfully, riotously, and routously throw a dangerous missile called a brickbat at and towards said S., which missile hit and dangerously wounded one A. G., then and there being one of the watchmen of said city of Boston, who then and there was acting as an assistant of said S., con-

(u) For what purpose the special matter in this case is so elaborately set out, does not appear, though it was conceded by the attorney-general that it need not have contained more than the mere allegation of a riotous assault on an officer while in execution of a legal warrant. *Com. v. Tracy*, 5 Mete. 536. It was held by the court that the averment as to the warrant, etc., was supported by evidence that the officer was in the service of a legal precept, and had the defendant in his custody as a prisoner, to be examined on a charge of larceny in another state, and of being a fugitive from justice. See another form, *supra*, 879.

stable as aforesaid: and other wrongs and injuries unlawfully, riotously, and routously did and committed, etc.

(883) *Resistance to a peace-officer in the performance of his duties; form used in Boston.*

That A. B., etc., on, etc., at, etc., with force and arms, in and upon one then and there in the peace of said commonwealth being, an assault did make, he the said also then and there being a peace-officer, called and then and there also being in the due and lawful discharge of his duties as such officer. And so the jurors aforesaid, on their oath aforesaid, do say and present, that the said at Boston aforesaid, on the said day of said with force and arms, assaulted the said as such officer, and hindered, resisted, and obstructed him in the discharge of his lawful duties, in manner and form aforesaid, against, etc. (*Conclude as in book 1, chapter 3.*)

(884) *Resisting constable, while serving state warrant, under Ohio statute.*

That William B. Smith, of the township of Rockport, in the county of Cuyahoga aforesaid, on the nineteenth day of February, in the year of our Lord one thousand eight hundred and forty nine, was a justice of the peace in and for the township of Rockport, in the county aforesaid, and that the said William B. Smith, as such justice of the peace, then and there, on the said nineteenth day of February, in the year aforesaid, issued a certain warrant directed to any constable of said county, and which said warrant was in the words and figures following, that is to say: "The State of Ohio, Cuyahoga County, ss.: To any Constable of said County, Greeting: Whereas, complaint upon oath by B. S. has this day been made before me, Wm. B. Smith, a justice of the peace in and for the said county, that on the 29th day of January, A. D. 1849, at Rockport, in the said county, A. B. did make threats of personal injury and violence to him the said B. S., and that the said B. S. has just cause to fear, and does fear that he the said A. B. will injure his person or property by violence to the same: Therefore, in the name of the State of Ohio, I command you that you take the said A. B., if he be found in your county, or if he shall have fled

that you pursue after the said A. B., into any other county in this state, and take and safely keep the said A. B., so that you have him forthwith before me or some other justice of the peace of the said county, to answer to the said complaint, and to be dealt with according to law. Given under my hand and seal this 19th day of February, A. D. 1849.

Wm. B. Smith,
Justice of the Peace." [SEAL.]

and that the warrant aforesaid, so issued as aforesaid, was on the nineteenth day of February, in the year aforesaid, delivered to one M. N., a constable in and for the said township of Rockport, in the county aforesaid, legally authorized and duly qualified as such constable, to be executed by him the said M. N., as such constable, upon the body of the said A. B., according to the command of said warrant, and that in obedience to the command of said warrant, so issued as aforesaid, the said M. N., as such constable as aforesaid, did afterwards, to wit, on the said nineteenth day of February, in the year aforesaid, in the township aforesaid, in the county aforesaid, proceed to execute said warrant, by taking the body of the said A. B., according to the command of said warrant, and that the said A. B. then and there unlawfully, wilfully, and knowingly did assault, beat, abuse, and resist the said M. N., so being then and there in the execution of his said office of constable as aforesaid, to wit, being then and there in the execution of said warrant as aforesaid, (r) he, the said A. B., then and there well knowing the said M. N. to be such constable as aforesaid, and that the said M. N. then and there was acting, and then and there claimed to act, as such constable in the execution of his said office. (*Conclude as in book 1, chapter 3.*)

(r) S. J. Noble, Pros. Atty. P. Bliss, P. J. Conviction and sentence. A part of the original, setting out the indorsement on the warrant, is here omitted. The part from (c) to the close is added. 23 Ohio R. 171; Warren's C. L. 76.

(885) *Resistance to the marshal of the United States in the service of a writ of arrest.*(w)

That heretofore, to wit, on, etc., a certain judicial writ of arrest, directed to the marshal of the said district of Pennsylvania, was duly awarded and issued by and out of the district court of the United States, in and for the said district of Pennsylvania, in a certain cause, civil and maritime, between G. O., A. W., A. R., and D. C., libellants, and E. S. and E. W., surviving executrixes of D. R., Esq., deceased, respondents, which said judicial writ of arrest was duly delivered to J. S., Esq., an officer of the said United States, to wit, marshal of the said district of Pennsylvania, at Philadelphia, in the district aforesaid, on the said in the year aforesaid, and was of the purport and effect following, that is to say:—

“United States,
District of Pennsylvania, } *set.:*

[SEAL.] “Richard Peters, Judge of the District Court of the
United States in and for the District of Pennsylvania,
to the Marshal of the same district,
Greeting:

“Whereas, heretofore, to wit, on, etc., it was adjudged, ordered, and decreed in a certain cause, civil and maritime, then depending in this court between G. O., A. W., A. R., and D. C., libellants, and E. S. and E. W., surviving executrixes of D. R., Esq., deceased, respondents, that the certificates in the libel in the said court filed, mentioned, should be transferred and delivered, and the interest moneys paid over by the said respondents to the said libellants, in execution of the judgment and decree of the court of appeals, as stated in the proceedings in the said cause, with costs; provided, however, that the bond of indemnity should be cancelled or delivered to the said respondents on their compliance with the said decree:

“Therefore, you are hereby commanded, in the name and by the authority of the United States, that you forthwith attach and arrest the bodies of the said respondents, E. S. and E. W.,

(w) This indictment, which was incident to a serious collision between the authorities of the United States and of the state of Pennsylvania, bears the name of Mr. A. J. Dallas. See generally *U. S. v. Tinklepaugh*, 3 Blatch. C. C. 425; *Wh. Cr. L.* 8th ed. §§ 649, 652.

and them so attached and arrested, to keep and detain under safe and secure arrest until they shall in all things comply with and perform the final sentence or decree pronounced in this cause on the said

“Given under my hand and the seal of the District Court,
at Philadelphia, this and in the year of the
independence of the said United States.

“ R. P.

“S. D. C., Clerk Dist. Court.”

And the grand inquest aforesaid do further present, that the said judicial writ of arrest being duly awarded, issued, and delivered as aforesaid, afterwards, to wit, on, etc., at, etc., in the said district, the said J. S., then and there being an officer of the said United States, to wit, marshal of the district aforesaid, attempted to serve and execute the said writ of arrest in manner and form as he was therein commanded; and that M. B., late of the said district, esquire, J. A., late of the said district, yeoman, W. C., late of the said district, yeoman, C. W., late of the said district, yeoman, S. W., late of the said district, yeoman, A. O., late of the said district, yeoman, D. P., late of the said district, yeoman, C. H., late of the said district, yeoman, and J. K., late of the said district, yeoman, with divers other persons to the said grand inquest unknown, being then and there well and truly informed of the premises, then and there, with force and arms, did knowingly, wilfully, and unlawfully obstruct, resist, and oppose the said J. S., then and there being an officer of the said United States as aforesaid, to wit, marshal of the said district, in attempting as aforesaid then and there to serve and execute the said judicial writ of arrest in manner and form as he was therein commanded, to the great damage of the said J. S., to the great hinderance and obstruction of justice, to the evil example, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Add second count for assault on same.*)

(886) *Refusal to aid a constable in the service of a capias ad respondendum issued by a justice of the peace.*(x)

That D. P., then and there being one of the justices of the

(x) *Comfort v. Com.*, 5 Whart. 437. There was a refusal to arrest judgment on this indictment in the quarter sessions of Bucks county, and an affirmance of the judgment in the supreme court.

peace in and for the county of Bucks, duly commissioned, qualified, and empowered to perform the duties of that office, and being so commissioned, qualified, and empowered, did, on, etc., at, etc., then and there make his certain writ in writing under his hand and seal, directed to the constable of the borough of Newhope, or to the next constable of the said county most convenient to the defendant, in the county aforesaid; by which said writ the constable aforesaid was commanded to take J. H., of Solesbury township, in the said county, and bring him before the subscriber, a justice of the peace of said county, forthwith on the service thereof, to answer L. S. in a plea of debt not exceeding one hundred dollars, and that should be his warrant; which said writ was afterwards, to wit, on, etc., delivered to one S. H. P., town constable of the borough of Newhope in the said county, duly elected, appointed, and qualified to perform the duties of that office, to be by him executed in due form of law, and that the said S. H. P., so being town constable as aforesaid, afterwards, to wit, on, etc., by virtue of the said writ, did then and there, at the county aforesaid, and within the jurisdiction of this court, take and arrest the said J. H., and him the said J. H. the said S. H. P. in his custody by virtue of the said writ then and there had, and that the said J. H. did then and there, at the county aforesaid, on the day and year last aforesaid, with force and arms, violently, forcibly, and unlawfully resist and obstruct the said S. H. P. in the execution of his said office, and attempt to escape from his lawful custody and go at large, contrary to the will of the said S. H. P., and that he, the said S. H. P., being such town constable as aforesaid, thereupon did then and there, on the day and year last aforesaid, at the county aforesaid, and within the jurisdiction of this court, in his proper person apply to J. C., E. C., J. K., T. K., and W. K. Jr., all late of the township of Solesbury, in the said county, yeomen, and they the said J. C., E. C., J. K., T. K., and W. K. Jr., all being then and there present, and in the name of the commonwealth of Pennsylvania, did then and there, on the day and year last aforesaid, at the county aforesaid, charge and require them, the said J. C., E. C., J. K., T. K., and W. K. Jr., to aid and assist him in the preservation of the peace of the said commonwealth, and for the securing the said J. H., and for preventing the said

J. H. from effecting his escape from and out of the lawful custody of him the said S. H. P.; he the said S. H. P. being then and there such town constable as aforesaid, in the due execution of his said office, in conveying the said J. H. before the said justice of the peace, to be dealt with according to law. Yet the said J. C., E. C., J. K., T. K., and W. K. Jr., all being then and there duly informed that the said S. H. P. was such town constable as aforesaid, and well knowing the same, and that he the said S. H. P. was in the due execution of his said office, and not regarding their duty in that respect, to wit, on the day and year last aforesaid, to wit, at the county aforesaid, and within the jurisdiction of the court, with force and arms, unlawfully, obstinately, and contemptuously did neglect and refuse to aid and assist him, the said S. H. P., for the purpose and on the occasion aforesaid, in the manner they, the said J. C., E. C., J. K., T. K., and W. K. Jr., were charged and required to do as aforesaid, or in any other manner whatever, contrary to their duty in that behalf; whereby the said J. H. did then and there, to wit, on the day and year last aforesaid, at the county aforesaid, and within the jurisdiction of this court, effect his escape from and out of the lawful custody of him the said S. H. P., and against the will of the said S. H. P., he the said S. H. P. being then and there such town constable as aforesaid, and in the due execution of his said office, and did go at large in manifest contempt of our said commonwealth and her laws; to the great hinderance of justice, the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(887) *Assault with intention to obstruct the apprehension of a party charged with an offence.(y)*

That A. B., late of, etc., on, etc., with force and arms, at, etc., in and upon one C. D., a subject of our said lady the queen then

(y) Dickinson's Q. S. 6th ed. 323. The following count, which formed the fourth in *R. v. Fraser* (1 Mood. C. C. 419), will (though for cutting and wounding) be useful for framing indictments for common assaults, with intent to obstruct arrest:—

“In and upon said J. C., in the peace of God and our said lady the queen then and there being, unlawfully, etc., did make an assault, and then and there unlawfully, etc., did cut and wound said J. C. in and upon the head and face of said J. C., with intent to resist and prevent the lawful apprehension and detainer

and there being, wilfully and unlawfully did make an assault, and him the said C. D. did then and there beat, wound, and ill-treat, with intent in so doing wilfully and unlawfully to obstruct, resist, and prevent the lawful apprehension and detention of him the said A. B. for a certain offence, to wit, for, etc. (*here state the offence with which the defendant was charged*), for which said offence, he the said A. B. was then and there liable by law to be apprehended, imprisoned, and detained, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

And the jurors, etc., that the said A. B. heretofore, to wit, on, etc., aforesaid, with force and arms, at, etc., aforesaid, in and upon the said C. D. wilfully and unlawfully did make an assault, and him the said C. D. did then and there beat, wound, and ill-treat, with intent in so doing wilfully and unlawfully to obstruct, resist, and prevent the lawful apprehension and detention of him the said A. B. for a certain offence, before then committed, to wit, at, etc., aforesaid, for the committing of which said last mentioned offence he the said A. B. was then and there liable by law to be apprehended, imprisoned, and detained, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Add a count for common assault.*)

(888) *Assault on a deputy-gaoler in the execution of his office.*(z)

That A. B., late of the castle of Lancaster, in the county of Lancaster, laborer, on with force and arms, at the castle of Lancaster, at Lancaster aforesaid, in the said county, in and upon one J. C., then and there being deputy-keeper of his majesty's gaol of the castle of Lancaster, and having the custody of divers persons confined in the said gaol, and then and there being in the due execution of his said duty and office of deputy-keeper as aforesaid, (a) did make an assault, and him the said J. C. did beat, bruise, wound, and ill-treat, so that his life then and

of him the said M. F., for a certain offence by him committed, for which he the said M. F. was then and there liable by law to be apprehended and detained, that is to say, for then and there wilfully and maliciously committing damages and injury upon certain plants and roots then and there growing in a certain garden of and belonging to H. L., there situate, against the statute, etc., and against the peace, etc."

(z) Stark. C. P. 430. As to assaults on officers, see Wh. Cr. L. 8th ed. §§ 646 *et seq.*

(a) The process need not be set out. Wh. Cr. L. 8th ed. § 650.

there was greatly despaired of, and other wrongs to the said J. C. then and there did, to the great damage of the said J. C., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Add a count for a common assault.*)

(889) *Resisting a sheriff in execution of his office. First count, assault on sheriff, at common law.*(b)

That W. P. II., on, etc., at, etc., with force and arms, in and upon one A. S., in the peace of God and of this state then and there being, and then being sheriff of said county of Addison, and in the due execution of his said office, then and there did make an assault, and him the said A. S., so being in the due execution of his said office aforesaid, then and there did hinder and impede,(c) and then and there did beat, wound, and ill-treat, and other wrongs to the said A. S. then and there did, to the great damage of the said A. S., and against, etc. (*Conclude as in book 1, chapter 3.*)

(890) *Second count. The same under statute, specially setting out the execution which the sheriff was serving, etc.*(d)

That the said W. P. II., at, etc., aforesaid, on, etc., with force and arms, wilfully and knowingly did impede and hinder a civil officer, under the authority of this state, in the execution of his office, to wit, A. S., sheriff of the county of Addison aforesaid, in the peace of God and this state then and there being, in then and there serving, and attempting to serve and execute, a legal writ of execution, to wit, a *pluries* writ of execution, regularly issued on a judgment rendered by the honorable county court, in and for said county of Addison, at a term of said court begun and holden at Middlebury, in and for said county of Addison, on, etc., said execution dated, etc., and signed by S. S., clerk of said court, and directed to any sheriff or constable in the state, and made returnable in sixty days from the date thereof, whereby, after reciting that II. G. of said Middlebury,

(b) *State v. Hooker*, 17 Vt. 231. This, with a count for common assault and battery, was considered by the supreme court as well pleaded.

(c) It is not enough to aver "resist." This is a mere conclusion of law. *Lamberton v. State*, 11 Ohio, 282; Wh. Cr. L. 8th ed. § 649.

(d) This special averment of process, however, is surplusage. *McQuoid v. People*, 3 Gilman, 76.

by the consideration of the county court begun and holden at Middlebury, in and for said county of Addison, on, etc., recovered judgment against the said W. P. H. and one C. H. in an action of trespass (the cause of which action it was adjudged by said court arose from the wilful and malicious act of the defendants), in the sum of three hundred and forty-one dollars and fifty-six cents damages, and for the sum of thirty-two dollars and seventy cents costs of suit, whereof execution remains to be done for the sum of three hundred and seven dollars and seventy cents, said officer, as often before commanded, is therefore, by virtue of said writ of execution, by the authority of the state of Vermont, commanded to cause to be levied of the goods, chattels, or estate of the said W. P. H. and C. H., said sum of three hundred and seven dollars and seventy cents, with twenty-five cents more for said writ of execution and fifty cents for two others, and for want of the goods and chattels of said W. P. H. and C. H., shown or to be found by said officer within his precinct, commanding him to take the bodies of said W. P. H. and C. H., and them commit to the keeper of the common jail of Middlebury, in said county, within said prison, which said writ of execution so duly issued as aforesaid, in full life, and in no way satisfied, paid, or discharged, was on, etc., delivered to said A. S., sheriff as aforesaid, to serve and return, and afterwards, to wit, on, etc., at Middlebury aforesaid, the said A. S., then being sheriff as aforesaid, for want of the goods, chattels, or lands of the said W. P. H. and C. H., shown him or to be found within his precinct whereon to levy said writ of execution, attempted to serve and execute said writ of execution as he was therein commanded, by arresting the body of said W. P. H.; and the said W. P. H., then and there unlawfully and wickedly intending to impede and hinder the said A. S. in the execution of his said office, and well knowing that said A. S. was sheriff of the county of Addison as aforesaid, and that said A. S. then and there had said writ of execution so duly issued and in full force as aforesaid to serve and execute, and was then and there attempting to serve and execute said writ of execution, did, with force and arms, then and there impede and hinder the said A. S., sheriff as aforesaid, in attempting to serve and execute said writ of execution, in the execution of his said office, by beating and

bruising the said A. S., with a large and heavy bludgeon, on his head, shoulders; and arms, to the great damage of the said A. S., to the great hinderance and obstruction of justice, and contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(891) *Assault on police officer of the city of Boston.*(e)

That, etc., on, etc., at, etc., with force and arms, in and upon one G. L. an assault did make, said L. then and there being a police officer of the city of Boston, and then and there being in the lawful discharge of his duty as such police officer, and him then and there did beat, wound, bruise, and evil treat, and did then and there obstruct, hinder, and oppose said G. L. in the discharge of his duty as said police officer, and which he the said G. L. was then and there attempting lawfully to perform, against, etc. (*Conclude as in book 1, chapter 3.*)

(892) *Assaulting a person specially deputized by a justice of the peace to serve a warrant.*(f)

That S. F., of in the county of yeoman, on, etc., with force and arms, at, etc., in and upon the body of one P. W. did make an assault, he the said P. W. being then and there duly and lawfully appointed to serve and execute a certain warrant, legally issued against the said S. F., and the said P. W. being then and there in the due and lawful execution of the said warrant, and that he the said S. F. him the said P. W. did then and there beat, abuse, and ill-treat, and in the due and lawful exercise of his said office did then and there unlawfully and

(e) *Com. v. Hastings*, 9 Mete. 259.

(f) In this form there is no averment that the prosecutor was an officer, and in the case for which it was drawn, the fact was that he was not. It appeared that he was specially deputized by a justice to arrest the defendant for breach of the peace. There was nothing introduced in the evidence to show that the deputation was made through necessity, or that no regularly constituted officer was at the time accessible; and the court held that under such circumstances, there being no valid appointment, the warrant was no protection to the prosecutor. Whether or not such deputation would have been good if it had appeared that there was no officer at hand to have served the warrant, was doubted. *Com. v. Foster*, 1 Mass. 489. Wherever the prosecutor is a regular constable, it is better specially to aver the fact; though if the official aggravation be badly pleaded, the whole of it may be rejected as surplusage, and a verdict sustained on the mere assault. A sheriff's deputy, however, will be protected in the execution of his office, whether he be formally appointed by writing or not. *Com. v. Field*, 13 Mass. 321. The nature of the process, however, need not be detailed. *Wh. Cr. L.* 8th ed. § 649.

knowingly obstruct, hinder, and oppose, and other wrongs then and there did and committed; to the great damage of the said P. W., and against, etc. (*Conclude as in book 1, chapter 3.*)

(893) *Assaulting peace or revenue officers in the execution of their duties.(g)*

That A. B., etc., on, etc., at, etc., in and upon one J. N., then and there being a peace-officer, to wit, a constable (*any peace-officer or revenue officer, or any person acting in aid of such officer*), and then and there being in the due execution of his duty as such constable, did make an assault, and him the said J. N., so being in the execution of his duty as aforesaid, then and there did beat, wound, and ill-treat, and other wrongs to the said J. N. then and there did; to the great damage of the said J. N., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)
(*Add a count for a common assault.*)

(894) *Resisting an officer of the customs in the discharge of his duty.(h)*

That S. L., etc., on, etc., at, etc., did forcibly resist, prevent, and impede a certain J. J. R. in the execution of his duty as an officer of the customs for the district aforesaid; he the said J. J. R. being then and there an inspector of said district, and as such duly appointed and authorized to seize all goods, wares, and merchandise imported into said district contrary to law. And the said J. J. R. being then and there in the peace of the United States, and having then and there, in the due execution of his office as aforesaid, the charge and possession of certain goods, wares, and merchandise on board of a certain vessel, to wit, the brig "Star," as having been imported into the United States and into the district aforesaid contrary to law, he the said S. L. did then and there forcibly take and carry away from said vessel, and from the possession and custody of the said J.

(g) Archbold's C. P. 5th Am. ed. 545.

This is under the English statute, which affixes a specific penalty on "any assault upon any revenue or peace-officer in the due execution of his duty, or upon any person acting in aid of said officer."

(h) Under this indictment the defendant was convicted in Philadelphia, in 1842.

J. R., the said goods, wares, and merchandise, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That the said S. L., afterwards, to wit, on, etc., did forcibly resist, prevent, and impede(*i*) a certain J. J. R., an officer of the customs for the district of Philadelphia, in the United States of America, he the said J. J. R. being then and there an inspector of said district, and as such duly appointed and authorized to take charge and possession of all goods, wares, and merchandise imported into said district, in the execution of his duty as an inspector as aforesaid, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*i*) This count, though no exception was taken to it on trial, is defectively pleaded. The mode of resistance should be set out. *Lamberton v. State*, 11 Ohio, 282; Almeida's case, *infra*, 1061-2; Wh. Cr. Pl. & Pr. 151, 221; though see *U. S. v. Batchelder*, 2 Gallis. 15, where the form in the text is approved.

CHAPTER V.

COMPOUNDING FELONY.

(895) At common law for compounding a felony. *

(896) Compounding misdemeanor. (Stat. 18 Eliz.) First count.

(895) *At common law for compounding a felony.(a)*

That one A. B., late of, etc., on, etc., with force and arms, at, etc., one silver spoon, of the value of five shillings, of the goods and chattels of one C. D. then and there being found, feloniously did steal, take, and carry away, against, etc.(b) (*Conclude as in book 1, chapter 3.*)

And that the said C. D., late of, etc., well knowing the premises, but unlawfully and unjustly contriving and intending to prevent the due course of law in this behalf, and to procure

(a) Dickinson's Q. S. 6th ed. 346.

(*Offence at common law.*) The agreeing to receive money in consideration of compounding a charge of felony is a high misdemeanor, subjecting the party who commits it to imprisonment and fine. 1 Hale, 546, 619; 2 Hale, 400. See Wh. Cr. L. 8th ed. § 1559, etc. Formerly it was thought to constitute the offender an accessory to the original crime; but this construction has not prevailed in modern times. 4 Bla. Com. 134. The offence is consummated by a person receiving a note from a party charged with larceny as a consideration for not prosecuting the suit. *Com. v. Pease*, 16 Mass. 91. It is also a misdemeanor to receive money for compounding a prosecution for misdemeanor, or a criminal information, without leave of the court in which the proceeding is depending (*Collins v. Blantern*, 2 Wils. 341, 349; *Edgecomb v. Ross*, 5 East, 298, 302); but that permission is sometimes granted in cases of personal injury. See remarks of Gibson, C. J., in *Brittain v. Doylestown Bank*, 5 W. & S. 99. The compounding penal actions without leave of the court, was made punishable by the statute 18 Eliz. c. 5, ss. 3 and 4 (see *R. v. Stone*, 4 C. & P. 379; *R. v. Crisp*, 1 B. & Al. 282; *R. v. Gotley*, R. & R. 84; *R. v. Best*, 9 C. & P. 368), with the forfeiture of £10, half to the party grieved and half to the crown, with exposure in the pillory (now abolished). But 18 Eliz. c. 5, does not apply to informations for offences cognizable only before magistrates; and, therefore, an indictment for compounding such an offence was holden bad in arrest of judgment. *R. v. Crisp*, 1 B. & Al. 282. As to indictment, see *People v. Buckland*, 13 Wend 592; *State v. Williams*, 2 Harring. 532; *State v. Dandy*, 1 Brev. 395. See generally as to compromise of misdemeanors, 6 Penna. L. J. 359.

(b) The record of conviction is *prima facie* evidence of defendant's guilt as against compounder. *State v. Williams*, 2 Harring. 532.

the said A. B. to escape with impunity, afterwards, to wit, on, etc., at, etc., unlawfully and unjustly, and for the sake of wicked lucre, did compound the said felony with the said A. B., and did then and there exact, receive, and have of the said A. B., five pounds in moneys numbered for and as a reward for compounding for the said felony, and for desisting from all prosecution of the said A. B. for the felony aforesaid, and that the said C. D., on, etc., at, etc., did thereupon desist, and from that time hitherto hath desisted, from all prosecution of the said A. B. for the felony aforesaid, to the great hinderance of public justice, and against, etc.(c) (*Conclude as in book 1, chapter 3.*)

(896) *Compounding misdemeanor. (Stat. 18 Eliz.) First count.(d)*

That the defendant, disregarding the statute (18 Eliz. c. 5, s. 4), upon color and pretence that one W. P. had committed

(c) See 4 Went. 327.

(d) R. v. Best, 9 C. & P. 368.

The second count was like the first, except that it stated the selling of the spirits to be in a certain house in the occupation of William Peverill, he not having a retailing license.

In this case A. threatened B. that he would inform against him for selling spirits without a license, unless B. would give him a sum of money. B. had not in fact sold any spirits, but he gave A. the money to prevent an information; and it was held that A. was indictable under the stat. 18 Eliz. c. 5, s. 4, although B. had not committed any offence, and although no information was ever preferred nor any process sued out.

By stat. 18 Eliz. c. 5, s. 4, it is enacted "that if any person or persons (except the clerks of the court only for making out process otherwise than is above appointed) shall offend in suing out of process, making of composition, or other misdemeanor contrary to the true intent and meaning of this statute, or shall by color or pretence of process, or without process upon color or pretence of any matter of offence against any penal law, make any composition, or take any money, reward, or promise of reward, for himself, or to the use of any other, without order or consent of some of her majesty's courts at Westminster, that then he or they so offending, being thereof lawfully convicted, shall stand on the pillory, be disabled to sue in any action popular or penal, and forfeit £10; and justices of oyer and terminer, justices of assize on their circuits, and the quarter sessions, are empowered to hear and determine offences against this act."

By the stat. 56 Geo. III. c. 138, the punishment of the pillory was abolished as to this offence, and fine and imprisonment substituted for it.

Two other cases appear under this statute in the English books. In one, R. v. Southerton, 6 East, 126, it was held that a threatening to put in motion a prosecution for penalties for the purpose of obtaining money to stay the prosecution, is not an indictable offence at common law, although it be alleged that the money was obtained; but Lord Ellenborough intimates an opinion that the charge might have been supported if the indictment had been framed on the stat. 18 Eliz. c. 5.

In the other, R. v. Gotley, R. & R. C. C. 84, the prisoner was convicted of having compounded an offence against the highway act. Some of the counts

a certain offence against a certain penal law, in this, that the said W. P. had, before that time, sold by retail and delivered a quantity, less than two gallons, of certain spirits and distilled spirituous liquors, to wit, one quartern of gin to one E. H., without being duly licensed, against the form of the statute, etc., unlawfully, and for wicked gain's sake, and without the order and consent of the queen's courts at Westminster, did make composition with the said W. P., and take from him three sovereigns, three half-sovereigns, and ten shillings, twelve pennies, and twenty-four half-pennies, as a reward for forbearing to prosecute for the said supposed offence against the statute, and against, etc. (*Conclude as in book 1, chapter 3.*)

stated that the party from whom the money was taken had committed the offence; and the other stated that the prisoner compounded, and took money by and upon color and pretence of a certain matter of offence pretended to have been committed. It was proved that the person from whom the prisoner took the money had incurred a penalty of five pounds under the highway act, and that the prisoner had received money from him to compound it, but that no process had been sued out, and no information laid before any magistrate. Le Blanc, J., respited the judgment upon a doubt whether the offence was within the stat. 18 Eliz. c. 5, inasmuch as no action or proceeding was depending, in which the order or consent of any court in Westminster Hall for a composition could be obtained; but the judges held the conviction right; and that the statute 18 Eliz. c. 5, applies to all cases of taking a penalty incurred, or pretended to be incurred, without leave of a court at Westminster, or judgment or conviction.

CHAPTER VI.

MISCONDUCT IN OFFICE; INCLUDING EXTORTION, NEGLECT OF DUTY, ESCAPE, AND CRUELTY TO SEAMEN, CHILDREN, AND PAUPERS ^(a)

- (897) Against a magistrate, for committing in a case where he had no jurisdiction.
- (898) Against a magistrate, for neglect of duty at a riot.
First count, for neglecting to read the riot act.
- (899) Against a justice of the peace, for proceeding to the duties of his office in a state of intoxication.
- (900) Against a justice of the peace, for issuing a warrant without oath, using falsely the name of a third party as prosecutor.
- (901) Against a justice of the peace in Pennsylvania, for refusal to deliver transcript to party demanding it.
- (902) Against a justice of the peace in Massachusetts, for extortion generally.
- (903) Against a justice of the peace, for extorting fees for discharging a recognizance, and for not returning the same to the court for which it was taken.
- (904) Against a constable, for extorting money of a person apprehended by him upon a warrant, to let him go at large.
- (905) Against a constable, for neglecting to execute a warrant in a civil case.
- (906) Against a constable, for neglecting to execute a justice's warrant for the apprehension of a person.
- (907) Against a constable, for extorting and obtaining money under color of discharging a bench warrant.
- (908) Against constables, for neglecting to attend the sessions.
- (909) Against a high constable, for not obeying an order of sessions.

TOLL COLLECTORS.

- (910) Against a toll collector, for extorting toll from a person who had compounded.

INNKEEPERS.

- (911) Against an innkeeper, for not receiving a guest, he having room in his inn at the time.
- (912) Against an innkeeper refusing to entertain foot travellers.

(a) See Wh. Cr. L. 8th ed. §§ 1563 *et seq.*

OFFENCES AGAINST SOCIETY.

ATTORNEY.

- (913) Against an attorney, for buying a note, on New York Stat. sess. 41, ch. 259, etc.

MASTERS FOR MISCONDUCT OF SERVANT.

- (914) Against a master for neglecting to provide an apprentice of tender years with sufficient food, clothing, bedding, and other necessities.
(915) Against a mistress, for not providing sufficient food for a servant, keeping her without proper warmth, etc.

OVERSEERS FOR CRUELTY.

- (916) Against overseers, for cruelty to a pauper.

JUROR FOR NON-SERVING.

- (917) Against a juror, for not appearing when summoned on a coroner's inquest.

REFUSING TO SERVE IN OFFICES.

- (918) For refusing to serve the office of overseer of the poor.
(919) For refusing to execute the office of constable.
(920) For refusing to take the office of chief constable, being duly elected at the quarter sessions.

JAILOR, ETC., FOR ESCAPE.

- (921) Against a jailor, for a voluntary escape.
(922) Same, where the party escaping was committed by a judge as a fugitive from justice.
(923) Against a constable, for a negligent escape.

PRISONER, FOR ESCAPE.

- (924) Against a prisoner, for escape out of custody of constable.

OFFICERS OF VESSELS.

- (925) Inflicting cruel and unusual punishment on one of the crew of a vessel, etc.
(926) Against same for same, the punishment being beating and wounding, etc.
(927) Second count. Specifying the punishment more minutely.
(928) Confining a boy in run of a ship, etc.
(929) Second count. Refusing suitable food.
(930) Another form, withholding suitable food, etc.
(931) Forcing, etc., a seaman ashore in a foreign port.
(932) Second count. Same in another form.
(933) Third count. Leaving behind seaman.
(934) Leaving seaman in foreign port.
(935) Refusing to bring home a seaman.

(936) Another form for same.

(937) Against the captain of a vessel, for bringing into the port a person with an infectious disease, under the Pennsylvania act.

(938) Against a captain of a vessel, for not providing wholesome meat for his passengers.

(938a) Breach of pilot laws.

(897) *Against a magistrate, for committing in a case where he had no jurisdiction.*(b)

That on, etc., at, etc., one T. C., then being one of the constables of the said parish, brought one J. N. before J. S., Esq., then and yet being one of the justices of our said lady the queen, assigned to keep the peace of our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. N. then and there was charged before the said J. S. with having committed a certain supposed misdemeanor, in having vilified the character and hurt the trade of one A. C., of the parish aforesaid, miller; and the said J. N. was then and there examined before the said J. S., as such justice as aforesaid, touching the said supposed offence so to him charged as aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late of the parish aforesaid, in the county aforesaid, esquire, being such justice as aforesaid, wickedly and maliciously contriving and intending to oppress, injure, and aggrieve the said J. N. in this behalf, and to put him to great charge and expense, and to cause him to undergo and suffer great pain, torture, and anguish of body and mind, afterwards, to wit, on the day and year aforesaid, at, etc., did order and direct that the said J. N. should find sureties for his personal appearance at the next general quarter sessions of the peace of our said lady the queen, to be holden in and for the said county of M., to answer the said charge; and, because the said J. N. did not and could not conveniently find such sureties as aforesaid, he the said J. S., being such justice as aforesaid, wickedly and maliciously contriving and intending as aforesaid, wrongfully, unjustly, and maliciously, and contrary to the laws of this realm, then and there (by virtue and color of

(b) Arch. C. P. 5th Am. ed. 689. It would be better to add an averment of want of jurisdiction in the justice. See Wh. Cr. L. 8th ed. §§ 1572.

a certain warrant under his hand and seal, as such justice as aforesaid) did commit the said J. N. a prisoner to a certain prison called the house of correction, situate at the parish aforesaid, in the county aforesaid, to be there safely kept until he the said J. N. should find such sureties as aforesaid, and until he should be fully examined according to the premises; and then and there ordered, directed, and commanded the then keeper of the said prison to keep the said J. N. under close confinement in the said prison, and to deny him the use of pen, ink, and paper, and to allow no letter to be delivered to or from the said J. N., and also to allow no person to see or speak to him the said J. N. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., by virtue and under color of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, and from thence for a long space of time, to wit, for the space of ten days then next following, at the parish aforesaid, in the county aforesaid, wrongfully, unjustly, and maliciously, and contrary to the laws of this realm, did cause and procure the said J. N. to be closely confined and imprisoned in the said prison, and to be denied the use of pen, ink, and paper, and to be restrained from all communication with his relations and friends, to wit, at the parish aforesaid, in the county aforesaid; whereby the said J. N. during all that time underwent and suffered great pain, torture, and anguish of body and mind, and was deprived of his liberty and prevented from finding such sureties as aforesaid, and was put to great charge and expense in and about obtaining his discharge and release from the said commitment and imprisonment; to the great scandal of the administration of justice in this kingdom, in contempt of our lady the queen and her laws, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(898) *Against a magistrate, for neglect of a duty at a riot. First count, for neglecting to read the riot act.*(c)

That on, etc., at, etc., divers wicked, seditious, and evil disposed persons, to the number of fifty and more, whose names are

(c) *R. v. Kennett, Esq.*, 5 C. & P. 282. This information was filed on the 20 Geo. III. by Mr. Wallace, then attorney-general. There was a verdict of guilty before Lord Mansfield, but no sentence was passed.

The second and third counts were nearly similar, except that they omitted

at present unknown to the said attorney-general, with force and arms, unlawfully, riotously, and tumultuously assembled themselves together, to the disturbance of the public peace, tranquillity, order, and government of this realm, and to injure and destroy the properties of divers quiet and peaceable subjects of our said lord the king; and being so assembled did then and there unlawfully, riotously, tumultuously, and with force, feloniously and against the form of the statute in such case made and provided, begin to demolish and pull down the dwelling-house of M. C., there situate and being, and did also then and there unlawfully, riotously, and tumultuously injure and destroy the household furniture and effects of divers quiet and peaceable

such part of the charges in the first count as related to demolishing houses and furniture.

The fourth count stated a riot to have occurred in the defendant's presence, and that he, disregarding his duty, did not make the proclamation, but refused and neglected and omitted so to do.

The fifth count stated the riot, and that the defendant was a justice of the peace and present at it, and then went on: "And that the said B. K., being such justice of the peace as aforesaid, and disregarding the duty of his said office, did not apprehend or restrain the said persons so unlawfully, riotously, and tumultuously assembled as last aforesaid, or any of them, or endeavor so to do, or use any means or endeavors whatsoever to suppress and put an end to the said unlawful, riotous, and tumultuous assembly, or execute, or endeavor to execute, any of the powers and authorities by the laws of this realm vested in the said B. K. as such justice of the peace as last aforesaid, in that behalf; but the said B. K. then and there unlawfully, wilfully, and contemptuously refused, neglected, and omitted to apprehend or restrain the said rioters, or any of them, or endeavor so to do, or to use any means or endeavors whatsoever to suppress and put an end to the said unlawful, riotous, and tumultuous assembly, or execute, or endeavor to execute, any of the powers and authorities by the laws of this realm vested in him the said B. K. as justice of the peace aforesaid, in that behalf; and then and there unlawfully permitted and suffered the said persons so unlawfully, riotously, and tumultuously assembled, to be and continue there so unlawfully, riotously, and tumultuously assembled, for a long space of time, to wit, for the space of four hours, contrary to the duty of his said office of justice of the peace as aforesaid, in contempt," etc.

The sixth count was similar to the fifth count, except that it stated the riot in rather more general terms.

Lord Mansfield charged the jury generally, that "A magistrate may assemble all the king's subjects to quell a riot, and may call in the soldiers, who are subjects and may act as such; but this should be done with great caution; and that at the time of the riot, he might repel force by force before the reading of the proclamation from the riot act. If," he declared, "on a riot taking place, the magistrate neither reads the proclamation from the riot act, nor restrains nor apprehends the rioters, nor gives any order to fire on them, nor makes any use of a military force under his command, this is *prima facie* evidence of a criminal neglect of duty in him; and it is no answer to the charge for him to say that he was afraid, unless his fear arose from such danger as would affect a firm man; and if rather than apprehend the rioters his sole care was for himself, this is also neglect." The topic is discussed more fully in Wh. Cr. L. 8th ed. § 1584.

subjects of our said lord the king, whose names are at present unknown to the said attorney-general, and commit and perpetrate other outrages and enormities; and the said attorney-general of our said lord the king, for our said lord the king, giveth the court here to understand and be informed, that B. K., late of London aforesaid, esquire, at the time of the said unlawful, riotous, and tumultuous assembly, to wit, on, etc., and before and afterwards, was mayor of the city of London aforesaid, and also one of the keepers of the peace and justices of our said lord the king, assigned to keep the peace and also to hear and determine divers felonies, trespasses, and other misdemeanors committed within the said city of London, that is to say, at, etc.; and that the said B. K., being such mayor and justice of the peace as aforesaid, well knew of and was personally present at the time and place of the said unlawful, riotous, and tumultuous assembly, and whilst the said persons so unlawfully, riotously, and tumultuously assembled were committing and perpetrating the aforesaid felony, injuries, outrages, and enormities, to wit, on, etc., at, etc.; and it was then and there the duty of the said B. K., as such mayor and justice of the peace as aforesaid, for the dispersing of the persons so unlawfully, riotously, and tumultuously assembled as aforesaid, and the suppressing and putting an end to the said unlawful, riotous, and tumultuous assembly, to have then and there made, or caused to be made, proclamation in the manner prescribed and directed in and by an act of parliament, made in the parliament of the lord George the First, late king of Great Britain, etc., at a session thereof holden at Westminster, in the county of Middlesex, in the first year of his reign, entitled "An act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters." And the said attorney-general of our said lord the king, for our said lord the king, giveth the court here further to understand and be informed, that the said B. K., being such mayor and justice of the peace as aforesaid, and well knowing of the said unlawful and tumultuous assembly, and being so present as aforesaid, but disregarding his duty as such mayor and justice of the peace as aforesaid, and the directions contained in the said act of parliament for the suppressing of tumults and riots, did not at any time during the

said unlawful, riotous, and tumultuous assembly, make, or cause to be made, proclamation in the manner prescribed and directed by the said act of parliament, but then and there, to wit, on, etc., at, etc., wilfully, obstinately, and contemptuously neglected, refused, and omitted to make, or cause to be made, proclamation in the manner prescribed and directed by the said act of parliament, and thereby then and there unlawfully permitted and suffered the said persons so unlawfully, riotously, and tumultuously assembled as aforesaid, to be and continue there unlawfully, riotously, and tumultuously assembled as aforesaid, for divers, to wit, four hours, doing, committing, and perpetrating the said felony, injuries, outrages, and enormities, contrary to the duty of him the said B. K., as such mayor and justice of the peace as aforesaid, in contempt, etc. (*Conclude as in book 1, chapter 3.*)

(899) *Against a justice of the peace, for proceeding to the duties of his office in a state of intoxication.*(d)

That A. B., etc., on, etc., at, etc., did take his seat as a justice of the peace in the county of Loudon, the ninth of August, one thousand eight hundred and three, on the bench of the said county court, and act as a justice and member of the court then and there sitting, in giving his vote upon a judicial question and examination at the time depending in the said court, and in signing the minutes of its proceedings as presiding justice thereof, while he the said A. B. was in a state of intoxication from the drinking of spirituous liquors, which rendered him incompetent to the discharge of his duty with decency, decorum, and discretion, and disqualified him from a fair and full exercise of his understanding in matters and things, at the time and place last mentioned judicially before him, to the great disgrace of the administration of public justice, and to the evil example of persons in authority; whereby the said A. B. was guilty of misbehavior in his office of justice of the peace in and for the said county of Loudon, against, etc. (*Conclude as in book 1, chapter 3.*)

(900) *Against a justice of the peace, for issuing a warrant without oath, using falsely the name of a third party as prosecutor.(c)*

That A. B., justice, etc. (*stating office*), on, etc., at, etc., out of malice, etc., towards a certain J. H., a surveyor of the highway, and with a wicked and malicious intent to disquiet, defraud, and oppress the said J. H., and falsely, wickedly, and maliciously to cause the said J. H. to be put to costs and expenses, unjustly, wickedly, maliciously, and unlawfully wrote, signed, and issued under his own hand, as such justice of the peace, a certain warrant or summons, to a constable directed, commanding him to summon the said J. H. to appear before him, the said A. B., to answer to a certain complaint and information of a certain J. W., made against him the said J. H., for not keeping a road (*describing it*) in repair, and upon that warrant or summons caused the said J. H. to appear before him the said A. B., as such justice of the peace, to answer the complaint aforesaid, and upon a hearing therein did not acquit the said J. H. of the complaint aforesaid, but unlawfully, corruptly, and wickedly adjudged the said J. H. to pay the costs of the same; whereas, in truth and in fact, the said J. W. never did make to the said A. B., nor to any other justice of the peace, the complaint or information aforesaid against the said J. H., nor did the said J. W., nor any other person, direct the said prosecution, but the said A. B. falsely and wickedly used the name of the said J. W., without his knowledge and against his directions, in contempt of his the said A. B.'s oath and duty, as a justice of the peace, to the evil example, etc. (*Conclude as in book 1, chapter 3.*)

(901) *Against a justice of the peace in Pennsylvania, for refusal to deliver transcript to party demanding it.(f)*

That W. B., etc., being a justice of the peace in and for the

(c) *Wallace v. Com.*, 2 Va. Cases, 130.

To this indictment the defendant pleaded not guilty, and the jury convicted him and assessed his fine at one hundred dollars. The superior court thereupon entered a judgment against him, that he be removed from his office of justice of the peace, and that he be incapable of exercising the duties of the same, and also a judgment for the fine. An application for a writ of error was afterwards refused by the general court.

(f) *Bailey v. Com.*, 5 Rawle, 39. This indictment is under the Pennsylvania act of 20th March, 1816, § 23, and was sustained by the supreme court as sufficiently descriptive of the offence created by that section.

district numbered six, composed of the townships of B. and S., in the said county of B., duly commissioned and sworn to do the duties of the said office with fidelity and according to law, a certain suit was commenced and instituted before him as such, of which suit and of the cause of action thereof he lawfully had jurisdiction and cognizance, wherein a certain J. B. was plaintiff, and a certain F. C. was defendant, and in which suit the said W. B., as a justice of the peace, entered judgment, and that on, etc., at, etc., and within the jurisdiction of this court, with force and arms, etc., he the said W. B., as a justice of the peace, did unlawfully refuse to make out a copy of his proceedings at large in the said suit, and deliver the said copy, duly certified by him, to the said F. C., the defendant in the suit; he the said F. C. having then and there required and demanded the same of the said W. B. as a justice; and he the said F. C. then and there did tender unto him the said W. B. as a justice of the peace, eighteen and three-quarter cents, the just and legal fee of him the said W. B. for his services in that behalf aforesaid; to the great hinderance and obstruction of public justice, against, etc. (*Conclude as in book 1, chapter 3.*)

(902) *Against a justice of the peace in Massachusetts for extortion generally.*(g)

That A. B., on, etc., then being one of the justices of the peace in and for the county of duly and legally appointed and qualified to perform the duties of that office, not regarding the duties of said office, but contriving and intending one C. D. to injure and oppress, on the said day of in the year aforesaid, at in the county aforesaid, by color of his said office, did wilfully, corruptly, and extorsively demand, take, and receive of him the said C. D.(h) a greater fee than is allowed and provided by law for the trial of a certain issue then and there in due form of law joined and pending before him the said

(g) Davis's Prec. 119. This indictment is founded on Massachusetts statute 1795, ch. 41, § 6, and may, says Mr. Davis, be adopted *mutatis mutandis*, for extortions by all other officers and persons mentioned in the statute.

(h) It would be better to aver the sum taken, and how much is illegal. Wh. Cr. L. 8th ed. §§ 1572, 1574 *et seq.* When the act is averred to be negligent, intent is not to be alleged. *State v. Small*, 1 Fairfield, 109; *People v. Coon*, 15 Wend. 277; *Jacobs v. Com.*, 2 Leight, 709; *State v. Gardner*, 2 Mo. 22.

A. B., as a justice of the peace for the said county of between the aforesaid C. D. and one E. F., in a certain civil action commenced and entered by the said C. D. against the said E. F., before him the said A. B., justice of the peace as aforesaid, at a justice's court duly appointed, and then and there held by him, the said A. B., to wit, the sum of for the trial of the said issue, which sum is more than the fee allowed and provided by law for the service aforesaid; contrary to the duty of him the said A. B. in his office aforesaid, against, etc. (*Conclude as in book 1, chapter 3.*)

(903) *Against a justice of the peace, for extorting fees for discharging a recognizance, and for not returning the same to the court for which it was taken.*(i)

That N. J., of, etc., on, etc., and continually afterwards, until the day of the taking of this inquisition, was, and yet is, one of the justices of the peace within and for the said county of, etc., duly and legally appointed and authorized to discharge the duties of that office. Nevertheless the said N. J., not regarding the duties of his said office, but perverting the trust reposed in him, and contriving and intending the citizens of this commonwealth, for the private gain of him, the said N. J., to oppress and impoverish, and the due execution of justice, as much as in him lay, to hinder, obstruct, and destroy. on the day of and between that day and the day of the finding of this bill, at aforesaid, in the county aforesaid, under color of his said office of justice of the peace for the said county of a certain sum of money, to wit, the sum of for not returning a certain recognizance before him, within the time aforesaid, taken for the appearance of one G. J. at a certain term of the (*here describe the court to which the recognizance was made returnable*), to be holden next after the taking of the recognizance aforesaid from the said G. J., unlawfully, unjustly, and extorsively did exact, receive, and have; and although the said next court of (*here describe the court*), for the county aforesaid, after the taking of the recognizance aforesaid, and to which the said re-

(i) Davis's Prec. 122; 1 Trem. P. C. 119. This indictment would be more correct if it contained an allegation of the particular nature and condition of the recognizance, and also that the magistrate was authorized to take it.

cognizance ought to have been returned, was held at in the county aforesaid, on the Tuesday of in the year aforesaid, in the due course of law, the said N. J. the said recognizance, to the court aforesaid, as of right, and according to his duty and the laws of said commonwealth he ought to have done, did not return, but suppressed the same, against the duties of his said office, to the great hinderance of justice, against, etc. *(Conclude as in book 1, chapter 3.)*

(904) *Against a constable for extorting money of a person apprehended by him upon a warrant, to let him go at large.(j)*

That A. B., of, etc., on at in the county aforesaid, then and there being one of the constables of the town of in the county aforesaid, did take and arrest one C. D., by virtue of a warrant duly made and issued, which he the said A. B. then and there had, directed, etc. *(here insert the warrant)*; and that the said A. B., him the said C. D. then and there had in his custody, by virtue of the said warrant, and that the said A. B. afterwards, to wit, on at in the county aforesaid, unlawfully, corruptly, and extorsively, for the sake of gain and contrary to the duty of his said office, did extort, receive, and take of and from the said C. D. the sum of for discharging the said C. D. out of the custody of him the said A. B., constable as aforesaid, without conveying the said C. D. before any justice of the peace in and for said county, or before any other lawful authority, to answer to the charges, matters, and things whereof he stood accused and charged as aforesaid; against, etc. *(Conclude as in book 1, chapter 3.)*

(905) *Against a constable, for neglecting to execute a warrant in a civil case.*

That whereas A. K. and D. F., Esqrs., two of the justices of the peace of the said county of P., duly elected and commissioned, did, on, etc., at, etc., and within the jurisdiction of this court, issue their warrant, under their hands and seals, to any

(j) Davis's Prec. 121; see 2 Chit. 295, 296; Cro. C. C. 327, 6th ed.; 2 Stark. 585; and for other precedents for extortion in 2 Chit. 296, 297; Cro. C. C. 327; 1 Trem. P. C. 111, 115; 2 Chit. 300, against a collector, for extorting money by color of his office. Wh. Cr. L. 8th ed. § 1574.

constable of the said county directed, setting forth that A. T., Esq., one of the sub-lieutenants of the said county, having before them the said justices obtained judgment, in due and regular form of law, against T. F., for the sum of twenty-five pounds ten shillings, lawful money of by him the said A. T. expended in procuring a substitute to serve in the militia, in the first class of the fifth battalion of the county aforesaid, in the place of him the said T. F., with costs; that the said constable was thereby required and enjoined to levy the said sum of twenty-five pounds ten shillings and costs, with the costs thereby accruing, by distress and sale of the goods and chattels, lands and tenements of the said T. F., as the law directed, returning the overplus, if any, to the owner. And the inquest aforesaid do say, that the said warrant was, on, etc., delivered and offered and tendered to be delivered to J. Z., then and there being constable of the township of W., one of the townships of the said county of P., to be by him executed. And the inquest aforesaid do further say, that the said J. Z., then and there being constable of the said township of W., on, etc., and ever since, until, etc., at, etc., and within the jurisdiction of this court, did neglect to execute the said warrant, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(906) *Against a constable, for neglecting to execute a justice's warrant for the apprehension of a person.*(k)

That heretofore, to wit, on, etc., at, etc., W. N., Esq., then and still being one of the justices assigned, etc., did make a certain warrant in writing, under his hand and seal, bearing date on, etc., directed to the constable of the parish of G., in the county of D., thereby in her majesty's name charging and commanding the said constable that, etc. (*here set forth the warrant*); which said warrant, afterwards, to wit, on, etc., at, etc., aforesaid, was duly indorsed for execution by and in the name of X. Y., Esq., then being mayor and one of her majesty's justices of the peace in and for the borough of D., in the said county of D., and which said warrant so indorsed, afterwards, to wit, on, etc., at, etc., was delivered to T. O., late of, etc., then and still being

(k) Dickinson's Q. S. 6th ed. 435. Wh. Cr. L. 8th ed. § 1580.

constable of the said parish of G., in the county aforesaid, in due form of law to be executed; and the said T. O. was then and there required to execute the same, by bringing the body of the said E. R. before the said W. N., at the time and place and for the purpose in the said warrant mentioned. And the jurors, etc., that although the said T. O. could and might and ought to have executed the said warrant accordingly, the said T. O., so being constable of the said township of G., in the county of D. aforesaid, not regarding the duty of his said office, did not, nor would, execute the said warrant as aforesaid, or otherwise howsoever, but unlawfully, wilfully, obstinately, and contemptuously neglected and refused so to do, and therein failed and made default; to the great hinderance of public justice, in contempt, etc., to the evil, etc., and against, etc.(l) (*Conclude as in book 1, chapter 3.*)

(907) *Against a constable, for extorting and obtaining money under color of discharging a bench warrant.(m)*

That A. B., late of, etc., on, etc., then being one of the constables of the said parish, at, etc., did take and arrest one C. D., by color of a certain warrant called a bench warrant, which he, the said A. B., then and there alleged that he had in his possession; and that the said A. B., afterwards, and while the said C. D. so remained in his custody as aforesaid, on, etc., at, etc., unlawfully, corruptly, deceitfully, and extorsively, and by color of his said office, did extort, receive, and take of and from the said C. D. the sum of two guineas,(n) as and for a fee due to him

(l) The 33 Geo. III. c. 55, gives summary jurisdiction to justices to punish parish officers for neglect of duty, but that remedy does not supersede the ancient one by indictment. Dickinson's Q. S. 6th ed. 435.

(m) Dickinson's Q. S. 6th ed. 435.

(n) An information against the ferryman over the Menai, laid the ferry to be ancient from time out of mind, and "that 1*l.* was the usual rate of passage for man and horse, 7*d.* for twenty cattle, 2*d.* for twenty sheep, etc., and that defendant, being the common ferryman between, etc., and day of exhibiting information, injuste oppressive et deceptiva cepit et extorsit de diversis ligeis et sudditis domini regis ignotis to the attorney-general, passing that way, diversas denariorum summas excedent antiquam rotam et pretium pro passagio et transportatione suis et averiorum suorum, viz., pro passagio cujuslibet personæ cum equo suo, 2*d.*, et pro quibuslibet 20 catallis, 2*s.*, et sic secundum ratam prædictam pro majori vel minori numero averiorum." Judgment arrested for accumulating several offences under a general charge; each extortion from every particular person being a separate offence which should have been laid singly, so as to enable the court to

the said A. B., as such constable as aforesaid, for the obtaining and discharging of the said warrant, as he the said A. B. then and there alleged; whereas, in truth and in fact, no fee whatever was then due from the said C. D. to the said A. B., as such constable in that behalf; in breach of the duty of his said office of constable, and against, etc.(o) (*Conclude as in book 1, chapter 3.*)

(908) *Against constables, for neglecting to attend the sessions.*(p)

That J. H. and A. Y., etc., on, etc., then and long before were constables of the township of Blockley, in the said county, and that T. A. of the same county, yeoman, on the day and year aforesaid, at the county aforesaid, was a constable of the township of B., in the said county; and that S. W., etc., on, etc., and long before was a constable of the township of L. D., in the said county, and that R. W., etc., on, etc., and long before was a constable of the township of the manor of M., in the said county, and that B. V., etc., on, etc., and long before, was a constable of the township of O., in the said county. And the inquest aforesaid, upon their oaths and affirmations aforesaid, do present that the said J. H., A. Y., T. A., S. W., R. W., and B. V., so being constables as aforesaid, the duty of their office not regarding, unlawfully and contemptuously, on, etc., at, etc., did absent themselves, and each of them did absent himself, from the general quarter sessions of the peace and gaol delivery, holden at P., in the said county, on the day and year aforesaid, for the county aforesaid, and then and there did neglect to make a return to the said sessions of all and such persons as were retailers of spirituous liquors by measure less than one quart within their respective townships, to the great hinderance of public justice, and against, etc. (*Conclude as in book 1, chapter 3.*)

proportion the fine to each offence. *R. v. Roberts*, Carth. 226; *Shower*, 189, S. C. Relied on in *R. v. Foster*, Ld. Raym. 475, and in *R. v. Rowand*. Dickinson's Q. S. 6th ed. 433.

(o) If any fee may be taken, the legal amount must be stated, or the indictment will be bad. *R. v. Levy*, in Q. B. 8 June, 1839; *Blake's case*, 3 Leon. 268. If the extortion is in levying an execution, the amount of extortion must be laid and shown. Dickinson's Q. S. 6th ed. 433.

(p) Drawn by Mr. Bradford in 1785.

(909) *Against a high constable, for not obeying an order of sessions.*(q)

That at the general quarter sessions of the peace, holden for the county of B., at, etc., in and for the county aforesaid, on, etc., before A. B., C. D., E. F., and G. H., Esqrs., and others their fellows, justices of our said lady the queen, assigned, etc., it was ordered by the said court there (*here set out the order of sessions in the past tense*), as by the said order, reference thereto being had, will more fully and at large appear, which said order was afterwards, to wit, on, etc., at, etc., personally served(r) on the said C. D., one of the high constables in the said order named, and the said C. D. then and there had notice of the said order, and was then and there requested to obey the same as therein mentioned; nevertheless, the said C. D., late of, etc., then being one of the high constables in the said order mentioned, unlawfully and contemptuously, upon being so served with the said order as aforesaid, did neglect and refuse to (*here state what the order required the defendant to do*), as by the said order he, the said C. D., was required to do, nor hath he, the said C. D., at any time since complied with or obeyed the said order, although often requested so to do; in contempt of the said justices, and against, etc. (*Conclude as in book 1, chapter 3.*)

(910) *Against a toll collector, for extorting a toll from a person who had compounded.*(s)

That C. B., etc., by color of being collector and receiver of the moneys and tolls at a certain turnpike or toll-bar gate, situate in,

(q) Dickinson's Q. S. 6th ed. 441.

(r) This is necessary, and the want of this allegation will not be supplied by the allegation that the defendant was requested to comply with the terms of the order. *R. v. Kingstone*, 6 East R. 52; *R. v. Moorhouse*, Cald. 554; Dickinson's Q. S. 6th ed. 441; Arch. C. P. 5th Am. ed. 691. See for forms of a similar nature, *Cro. Cir. Com.* 327; *R. v. Meredith*, R. & R. 46; *R. v. Booth*, Ib. 47; *R. v. White*, Cald. 183; *R. v. Robinson*, 2 Burr. 799; *R. v. Balme*, Cowp. 650; *R. v. Fearnly*, 1 T. R. 316; *R. v. Davis*, Say. 163.

(s) Dickinson's Q. S. 6th ed. 433.

Two observations particularly apply to this precedent:—

1st. That statute 3 Ed. I. c. 26, was only in affirmance of the common law, and therefore all *public* officers, properly so called, whether mentioned in that statute or not, seem to be subject to indictments for extortion. *Dalt. c. 41*; 1 Russ. C. & M. 144.

2d. That the question of exempt, or not exempt, from toll of a turnpike gate,

etc., aforesaid, on, etc., with force and arms, at, etc., aforesaid, unlawfully, extorsively, and deceitfully, and of his own wrong, extorted, asked, demanded, and received of one A. Z., husbandman, the sum of one shilling and sixpence, for a cart and two horses, that is to say, sixpence for a cart, and sixpence for each of two horses, then and there drawing the said cart belonging to him the said A. Z., for permitting the same to pass through the said turnpike or toll-bar gate, under color and pretence that the said A. Z. had neglected to take out and obtain from him the said C. B. such a ticket or certificate of composition and exemption from toll, as is permitted by a certain act of parliament, passed in the thirty-sixth year of the reign of his late majesty King George the Third, entitled (*here insert the title of the act*); whereas, in truth and in fact, he the said A. Z. had taken and obtained from the said C. B., and was then in possession of, such ticket or certificate of composition and exemption as aforesaid, signed with the name of the said C. B., and dated (*here set out the date to show that it was within the terms of the act*), as in the said mentioned act specified; against, etc. (*Conclude as in book 1, chapter 3.*)

(911) *Against an innkeeper, for not receiving a guest, he having room in his inn at the time.(t)*

That before and at the time herein next mentioned, T. I., late of, etc., laborer, was an innkeeper, and did keep a common inn for

cannot be tried on an indictment of a bar-keeper for extortion, the general right to take not having been denied, nor the ground of exemption notified. *R. v. Hamlyn*, 4 Campb. 379; *Dickinson's Q. S.* 6th ed. 433.

(t) *Dickinson's Q. S.* 6th ed. 438. See *Wh. Cr. L.* 8th ed. § 1587.

This was the form used in *R. v. Ivens*, 7 C. & P. 213. The defendant was convicted and fined twenty shillings. The marginal note is thus: "An indictment lies against an innkeeper who refuses to receive a guest, he having room in his house at the time (and it is not necessary for the guest to tender the price of his entertainment if his rejection is not on that ground; doubted by Lord Abinger, *C. B.*, *Fell v. Knight*, 8 M. & W. 276); and it is no defence for the innkeeper that the guest was travelling on a Sunday, and at an hour of the night after the innkeeper's family had gone to bed, nor that the guest refused to tell his name and abode, as the innkeeper had no right to insist upon knowing those particulars; but if the guest comes to the inn drunk, or behaves in an indecent or improper manner, the innkeeper is not bound to receive him." *Hawk. b. 1, c. 78, s. 2*, is full on this point, and adds, "Also it is said, that a person keeping a common inn may be compelled by the constable of the town to receive and entertain as his guest such a person as above, being a traveller. A traveller is entitled to reasonable accommodation, but cannot select a particular room, or insist on sitting up all night in a bed-room when a sitting-room is

the accommodation of travellers, that is to say, a certain common inn called the Bell Inn, together with certain stables for horses attached to the said inn, and which said inn and stables are situate in the parish and county aforesaid, †† and that whilst the said T. I. was such innkeeper, and so kept the said inn and stables as aforesaid, to wit, on, etc., at, etc., one S. P. W., then and there being a traveller, came to a certain outer door of the said inn, such outer door then and there being a usual door of entrance into the said inn for travellers and other persons, and then and there required the said T. I. to suffer and permit him the said S. P. W. to enter, and to stay and to lodge at the said inn for and during the night of the same day, and to suffer and permit a certain horse, upon which the said S. P. W. then and there rode, to enter and stay and lodge in the said stables for and during the time aforesaid; † and that the said S. P. W. was then and there ready and willing, and then and there offered the said T. I. to pay him a reasonable sum of money for such lodging for himself the said S. P. W. and his horse; †* and that neither was the said inn, nor were the said stables at the time of such application by the said S. P. W. as aforesaid, fully occupied, but there was then and there sufficient room in the said inn for the accommodation and entertainment of the said S. P. W. therein; and there was then and there sufficient room in the said stable for the accommodation and entertainment of the said horse for and during the time aforesaid; * but that the said T. I., not regarding his duty as such innkeeper, did not, nor would at the said time when he was so requested as aforesaid, suffer or permit the said S. P. W. to enter, to stay, or lodge at the said inn as aforesaid during the time aforesaid, nor did, nor would the said T. I., at the time when he was so requested as aforesaid, suffer or permit the said horse of the said S. P. W., upon which the said S. P. W. rode as aforesaid, to enter or lodge in the said stables for and during the time aforesaid; but so to do, the said T. I. then and there, without sufficient cause, wholly neglected and refused; to the great damage of the said S. P. W., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

offered; an innkeeper must admit all persons who apply peaceably to be admitted as guests." *Hawthorn v. Hammond*, C. & K. 404. See *Sunbalt v. Alford*, 3 M. & W. 248. *Hall v. State*, 4 Harring. 132; *State v. Matthews*, 2 Dev. & B. 424.

Second count.

That whilst the said T. I. was such innkeeper, and so kept the said inn and stables as aforesaid, to wit, on, etc., at, etc., the said S. P. W., then being a traveller, came to a certain outer door, etc. (*as in the first count, omitting the words between † and †**).

Third count. Similar to the second, except that it also omitted the allegation between † and *, and all mention of the horse.*

Fourth count. Same as first to ††, and then proceed :

And whilst the said T. I. was such innkeeper, and so kept the said inn as aforesaid, to wit, on, etc., at, etc., the said S. P. W., then and there being a traveller, came to the said inn, and then and there required the said T. I. to suffer and permit him the said S. P. W. to enter, and to stay and lodge at the said inn for and during a reasonable time for the rest and refreshment of him the said S. P. W., in the said inn, and that the said T. I., not regarding his duty as such innkeeper, did not, nor would at the said time when he was so requested as last aforesaid, suffer or permit the said S. P. W. to enter or stay or lodge at the said inn as last aforesaid ; but so to do, the said T. I. then and there, without any sufficient cause, wholly neglected and refused ; to the great damage, etc.(u) (*Conclude as in book 1, chapter 3.*)

(912) *Against an innkeeper refusing to entertain foot travellers.(v)*

That A. B., late of the county aforesaid, then and there being a licensed innkeeper, and keeping a house of public entertainment, on, etc., at, etc., with force and arms, etc., unlawfully and without reasonable cause did refuse to entertain and accommo-

(u) This precedent may be classed under neglects of duties imposed by common law. Dickinson's Q. S. 6th ed. 439.

(v) The above indictment, as it appears by a manuscript note of W. H. Dillingham, Esq., of Philadelphia, to whose kindness I am indebted for a number of valuable forms contained in the preceding pages, was prepared in the case of the Innkeepers of Chester, and supported by President Wilson, after argument.

It was ruled by the court that the common law principle of an innkeeper's liability holds in Pennsylvania, though limited to cases where a license is had ; that the first count was good in form, but that in order to support the indictment a tender must be proved, or an offer to pay, and waiver of tender by the landlord. 4 Bla. Com. 167, 168 ; 1 Hawk. P. C. 225, old ed. See Wh. Cr. L. 8th ed. § 1587.

date a certain person, to the grand inquest aforesaid unknown, the said person then and there being a traveller on foot, and applying for such entertainment and accommodation, to the great damage of the person so travelling on foot as aforesaid, to the public injury, and against, etc. (*Conclude as in book 1, chapter 3.*)

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said A. B., late of the county aforesaid, *then and there being a licensed innkeeper,*(*r*) and keeping a house of public entertainment for the accommodation of the good citizens of this commonwealth, and strangers thereby passing and repassing, as well travellers on foot as others, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, with force and arms, etc., unlawfully, and without reasonable cause, did refuse to furnish and supply the said person, to the grand inquest aforesaid unknown, so travelling on foot as aforesaid, and applying therefor, with lodging, victuals, drink, entertainment, and accommodation, to the great damage of the person so travelling on foot as aforesaid, to the public injury, and against, etc. (*Conclude as in book 1, chapter 3.*)

(913) *Against an attorney for buying a note, on New York Sts.*

Sess. 41, c. 259, etc.(x)

That J. W., etc., on, etc., at, etc., did buy a certain promissory note of and from one J. B. S., the holder and proprietor of the note, which was made and signed by one W. M., and dated April fourteenth, one thousand eight hundred and twenty-four; by which note W. M. promised to pay one A. V. A. the sum of twenty-five dollars and fifty cents, at the Bank of Lansingburg, in ninety days from the date; that the note was indorsed by

(*r*) The words in italics were not inserted in the indictment against the Innkeepers of Chester in the second count, but the court thought the indictment could only be supported in this state against *licensed innkeepers*, and thence it became necessary to prove their license.

(*x*) This form, as appears by *People v. Walbridge* (6 Cow. 512), is in substance the same with the indictment sustained in that case. It was there held, that an indictment against an attorney, etc., upon the statute (sess. 41, ch. 259, § 1), for buying a note, need not allege that he bought the note with intent to prosecute, etc., nor that the note has been prosecuted; nor need it show when it became due, its amount, or other circumstances from which an intent to prosecute is to be inferred. The act of buying, it was said, is the offence, unless it come within the proviso of the statute, which it lies with the defendant to show.

said A. V. A., whereby it became and was the property of J. B. S., till the purchase by the defendant for a good and valuable consideration; that said defendant, at the time he so purchased, was an attorney and counsellor of the supreme court of judicature of the state of New York, and of the court of common pleas of the county of Rensselaer; and that he did not then and there buy or receive the note in payment for any estate, real or personal, or for any services actually rendered, or for any debt antecedently contracted, or for any purpose of remittance, without any intent to violate or evade the act, etc., entitled "An act to prevent abuses in the practice of law, and to regulate costs in certain cases," passed April twenty-first, one thousand eight hundred and eighteen; to the evil, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That said J. W., on, etc., at, etc., did buy of and from one P. B., and become interested in buying of and from P. B., a certain other promissory note, made and signed by W. M., by which W. M. promised to pay to P. B., or bearer, the sum of forty-two dollars and sixty cents, said J. W., at the time he so bought and purchased the last mentioned notes, being, and still being, an attorney and counsellor of the supreme court of judicature of the people of the state of New York; and the inquest further present, that said J. W. did not then and there buy or receive the same note in payment for any estate, real or personal, or for any services actually rendered, or for any debt before that time contracted, or for any purpose of remittance; to the evil, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That said J. W., on, etc., at, etc., knowingly, wilfully, and corruptly became and was interested in buying a certain promissory note, made by one W. M., for the sum of one hundred and twenty-five dollars and fifty cents, payable to one A. V. A.; and also one other promissory note, made by W. M. to one E. G., for the sum of thirty-one dollars and twenty cents; also one other promissory note, made by W. M., payable to one C. F., for a sum of money to the jurors unknown; said J. W., at the time of the purchase of each and every of these notes, and at the time he became so interested in the purchase thereof, being, and still being, an attorney and counsellor of the supreme court of judicature of the people of the state of New York; and the

inquest aforesaid do further present, that he the said J. W. did not then and there become interested in the purchase of either of these notes, by way of payment for any estate, real or personal, or for any services rendered before the purchase of these notes respectively, or for any purpose of remittance, without any intent to evade or violate the act, etc. (*as in the first count*).

(914) *Against a master, for neglecting to provide an apprentice of tender years with sufficient food, clothing, bedding, and other necessities.*(y)

That one T. F., late of, etc., at, etc., did take and receive one S. Q. into the dwelling-house of the said T. F., as an apprentice of the said T. F., to be by him treated, maintained, and supported as an apprentice of him the said T. F., and did for a long time have and keep her in the said house as such apprentice as aforesaid, and that afterwards, to wit, on, etc., and on divers other days and times, as well before as after that day, and during the said time he so had and kept her in the said house as such apprentice, the said T. F., with force and arms, unlawfully and injuriously, and without the consent of the said S. Q., and against her will, and maliciously and unlawfully intending to hurt and

(y) Dickinson's Q. S. 5th ed. 359. See for same when death ensued, *ante*, 162, etc.

See *R. v. Friend, cor. Le Blanc, J., Exeter Ass., 1801*; *R. & R. C. C. 20*, cited by Lawrence, J., in 2 Campb. 651. There were two indictments for ill-usage of two female apprentices of the respective ages of twelve and fourteen. The wife of Friend was indicted with him, and the offences were charged against both prisoners "and each of them;" the indentures of apprenticeship and assignment of them were given in evidence. Each apprentice was to serve during the term, and the master during that term was to "find, provide, and allow to the said apprentice meet, competent, and sufficient meat, drink, apparel, lodging, washing, and other things necessary and fit for an apprentice, that she be not any way a charge" to the party binding her, "and to instruct her in housewifery." The wife was acquitted, and the male prisoner convicted and imprisoned. After two meetings of all the judges, and some difference of opinion, the general opinion was that it was an indictable misdemeanor to refuse or neglect to provide sufficient food, bedding, etc., to any infant of tender years, whether child, apprentice, or servant, unable to provide for and take care of itself, whom a man was obliged by duty or contract to provide for, so as thereby to injure its health; but that the indictment was defective in not stating the child to be of tender years and unable to provide for itself. However, as at the trial, objection was taken not so much to the indictment itself, as to the evidence adduced in its support, it was thought right that the prisoner should suffer his whole imprisonment. See *R. v. Meredith* and *R. v. Booth, R. & R. 47*, cruelty by overseers. Other cases of cruelty to children and dependents are noticed in Wh. Cr. L. 8th ed. §§ 1567, 1585. For homicide by neglect, see *supra*, 162.

injure the said S. Q., she the said S. Q. being such apprentice to the said T. F. as aforesaid, and then and there being an infant of tender years, to wit, of the age of years, and under the dominion and control of the said T. F., and unable to provide for herself, did neglect and refuse to find and provide for, and to give and administer to her, being so had and kept as such apprentice as aforesaid, sufficient meat, drink, victuals, wearing apparel, bedding, and other necessities proper and requisite for the sustenance, support, maintenance, clothing, covering, and resting the body of the said S. Q., by means whereof she became emaciated and nearly starved to death, and the constitution and frame of her body was greatly hurt and impaired, to the great damage, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(915) *Against a mistress, for not providing sufficient food for a servant, keeping her without proper warmth (z)*

That one E. R., late of, etc., the wife of S. R., unlawfully and maliciously contriving and intending to hurt and injure one E. W., being a servant to her the said E. R., and an infant of tender years, to wit, of the age of years, under the dominion and control of the said E. R., and unable to provide for herself, heretofore, to wit, on, etc., and on divers other days and times, as well before as after that day, with force and arms, at, etc., unlawfully, wilfully, and maliciously did omit, neglect, and refuse to provide for and give and administer to the said E. W. sufficient meat and drink necessary for sustenance, support, and nourishment of the body of her the said E. W., and did then and there expose the said E. W. to the cold and inclemency of the weather,^(a) as well within as without the house wherein the said E. R. then dwelt and kept the said E. W., without sufficient warmth necessary for the health of her the said E. W., to wit, at, etc.

(z) Dickinson's Q. S. 6th ed. 358.

This is the indictment against Elizabeth Ridley, 2 Campb. 650, but with the addition suggested by Lawrence, J., as necessary to sustain it. See 3 Chit. C. L. 1st ed. 861, and R. v. Friend, R. & R. C. C. 20. Wh. Cr. L. 8th ed. §§ 335, 359, 360, 1567, 1585. For homicide by neglect, see *supra*, 162 *et seq.* Unless the child be of tender years, unable to provide for itself, and is under the control of the defendant, so as to be unable to take any steps by leaving the service, or remonstrating or complaining to a magistrate, mere nonfeasance respecting it would be a mere breach of contract, and not indictable. See R. v. Ridley and R. v. Friend, *ut sup.*

(a) As to this part of the charge, see Dickinson's Q. S. 6th ed. 314, 320, 358.

(the said E. R. on the several days and times, and during all the time aforesaid, living separately and apart from the said S. R. her husband, to wit, at, etc.), (b) contrary to the duty of her the said E. R., as the mistress of the said E. W. in that behalf, by reason of all which premises she the said E. W. afterwards, to wit, on, etc., became and was, and for a long time, to wit, the space of six months then next following, continued to be very weak, sick, and ill, and greatly consumed and emaciated in her body, to wit, at, etc., aforesaid, to the great damage of the said W., and against, etc. (*Conclude as in book 1, chapter 3.*)

(916) *Against overseers, for cruelty to a pauper.*(c)

That on, etc., one M. S., a single woman, was a poor, weak, impotent, and infirm person, wholly unable to maintain herself, and legally settled within the township of B., in the W. R. of the county of Y., and justly entitled by the laws and statutes of this realm to have reasonable and necessary support and relief found and provided for her by the overseers of the poor of the said township, and that J. B., late of B. aforesaid, well knowing the premises, and having the said M. S. under his care, as a poor person of and belonging to the said township, but wilfully and maliciously intending to injure and oppress the said M. S., on the day and year aforesaid, and continually afterwards, until the day of the death of the said M. S., which happened on, etc., at B., in the said W. R., his duty in this behalf in no wise regarding, wilfully, maliciously, and unjustly neglected and refused

(b) Where the offender is a married woman, living with her husband, it is necessary to state (and prove), instead of the matter above placed within brackets, either that the child was imprisoned by her, which is sufficient to show her duty to provide it with food (*R. v. Edwards*, 8 C. & P. 611, *Patterson, J.*), or to allege as follows: "The said husband of the said on the several days and times, and during all the times aforesaid, having provided the said with sufficient meat, drink, and victuals necessary for the maintenance, support, and nourishment of the body of the said and with sufficient firing, covering, bedding, and other necessities proper and requisite for sustaining, supporting, maintaining, clothing, and resting the body of the said and covering the same from the cold and inclemency of the weather," S. C.; for her crime is the wilfully neglecting to deliver the food to the child after the husband had provided it. *R. v. Saunders*, 7 C. & P. 279, *Alderson, B.* A mother would be liable for the consequences of not suckling her unwearied infant, if she is able to do so; though if she be married, her husband would be bound to provide food for another child. See per *Patterson, J.*, *R. v. Edwards*; *Dickinson's Q. S.* 6th ed. 358, 359; *Wh. Cr. L.* 8th ed. §§ 331, 361.

(c) *Dickinson's Q. S.* 6th ed. 361.

to find and provide for the said M. S. reasonable and necessary meat, drink, clothing, bed, and bedding, whereby the said M. S. was reduced to a state of extreme weakness and infirmity; and afterwards, on, etc., at, etc., through the want of such reasonable and necessary meat, drink, clothing, and bed and bedding, died, to the great damage, injury, and oppression of the said M. S., and to the shortening of her life, to the evil example, etc., and against, etc.(d) (*Conclude as in book 1, chapter 3.*)

(*Add count for common assault.*)

(917) *Against a juror for not appearing when summoned on a coroner's inquest.(e)*

That on, etc., at, etc., one A. B. died within the limits of the borough of Reading, in the county of Berks, of a sudden and violent and not natural death, and that the body of the said A. B. then lay dead in the parish of St. G. within the limits of the borough aforesaid, whereof information had been then and there duly given to J. J. B., Esq., who was then the coroner of the borough aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that thereupon the said J. J. B., so being such coroner aforesaid, to wit, on the said day of in the year aforesaid, in the parish of St. G., within the limits of the borough aforesaid, duly made his certain warrant in writing under his hand and seal, and as such coroner as aforesaid, directed to the constables and wardens of the said borough, whereby the said coroner, in her majesty's name, charged and commanded them, that on sight thereof they should summon and warn twenty-four able and sufficient men of their constable-wick person-

(d) *R. v. Booth*, Dickinson's Q. S. 361. See, also, *supra*, 162. The prisoner was convicted and imprisoned. However, in 1803, six judges were of opinion that an overseer is not indictable for the consequences of not relieving a pauper, unless an order of justices for his relief is stated and proved (except in case of urgent necessity where no such order could be had in time): five judges thought the overseer so indictable, as he had taken the pauper under his care without such order. *R. v. Meredith*, R. & R. 46; Wh. Cr. L. 8th ed. §§ 178, 181. In *R. v. Warren* (1820) [R. & R. 48 n.], an overseer was indicted for neglecting to supply medical aid when required, to a pauper laboring under a dangerous illness; and Holroyd, J. held the offence sufficiently charged and proved, though the pauper was not in the workhouse, or before his illness needed parish relief.

(e) Dickinson's Q. S. 5th ed. 431. See statute 4 Ed. I. c. 2; *R. v. Jones*, 2 Stra. 1145; *R. v. Lowe*, Ib. 820; 2 Inst. 225; Fortescue de Laudibus, c. 25.

ally to appear before him on the said day of at
 o'clock in the at the house known by the sign of
 the in street, in the said borough, then and there to
 do and execute all such things as should be given them in charge
 on behalf of our sovereign lady the queen's majesty, touching
 the death of the said A. B., and that they should make a return
 of those whom they should so summon.

And the jurors aforesaid, upon their oaths aforesaid, do further
 present, that C. D., of the parish of St. G., within the borough
 aforesaid, on the said day of in the year afore-
 said, and long before, was an inhabitant householder of the par-
 ish of St. G. aforesaid, within the borough aforesaid, and a per-
 son able and sufficient to do and execute all such things as
 might and should be given to him in charge, on behalf of our
 said lady the queen, touching the death of the said A. B., and
 that he the said C. D. then and there was duly summoned and
 warned personally to appear before the said J. J. B., so being such
 coroner as aforesaid, at the time and place aforesaid, to do and
 execute all such things as there might be given to him in charge
 touching the premises aforesaid. Nevertheless, the said C. D.,
 wholly neglecting his duty in that behalf, did not nor would
 personally appear before the said J. J. B., so being such coroner
 as aforesaid, but so to do, and to do his duty on that behalf, then
 and there totally did neglect, and wilfully, obstinately, and con-
 temptuously did make default, against the form and effect of the
 said warrant and summons, in contempt, etc., and against, etc.
(Conclude as in book 1, chapter 3.)

Second count.

That the said C. D., on the said day of in the
 year aforesaid, and long before, was an inhabitant of and in the
 parish of St. G. aforesaid, within the borough aforesaid, and
 that he the said C. D. then and there was duly summoned and
 warned personally to appear before the said J. J. B., so being
 such coroner as aforesaid, at *(the particular time and place
 stated in the warrant)*, to do and execute all such things as
 then and there might be given to him in charge touching the
 death of the said A. B., then lying dead in the parish of St. G.
 aforesaid, within the borough aforesaid, of a violent death.

Nevertheless, the said C. D., wholly neglecting his duty in that behalf, did not nor would personally appear before the said J. J. B., so being such coroner as aforesaid, upon the occasion aforesaid; but so to do, and to do his duty in that behalf, then and there totally did neglect, and wilfully, obstinately, and contemptuously did make default; in contempt, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(918) *For refusing to serve the office of overseer of the poor.*(f)

That on, etc., at, etc., B. C., Esq., and D. E., Esq., then and yet being two of the justices of our said lady the queen assigned to keep the peace of our said lady the queen in the county of M., and also to hear and determine divers felonies, trespasses, and other misdemeanors committed in the same county (one of them being of the quorum), and both dwelling near the said parish of A., in the county of M. aforesaid, did under their hands and seals nominate and appoint F. G., late of, etc., then being a substantial householder in the said parish of A., in the county aforesaid, to be overseer of the poor of the said parish for the year then ensuing, according to the form of the statute in such case made and provided. And that afterwards, to wit, on, etc., at, etc., he the said F. G. had due notice of the said nomination and appointment, and was duly and legally served therewith; yet the said F. G., of the parish aforesaid, in the county aforesaid, yeoman, on the said day of in the year aforesaid, and continually afterwards until the day of the taking of this inquisition, during all which time he the said F. G. was, and continued, and yet is, an inhabitant and householder within the same parish, in the county aforesaid, at, etc., unlawfully, obstinately, and contemptuously, did, and yet doth neglect and refuse to take upon himself the execution of the said office of overseer of the poor of the said parish of A., in said county of M. to which he was so nominated and appointed as aforesaid, or to intermeddle or act therein; against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(f) Dickinson's Q. S. 6th ed. 430. As to what constitutes a householder for the purpose of liability to serve this office, see *R. v. Poynder*, 1 B. & C. 178.

(919) *For refusing to execute the office of constable.*(g)

That J. K., etc., of, etc., on, etc., at, etc., and within the jurisdiction of this court, to wit, at a court of general quarter sessions records, held before M. B. and L. L., etc., of the same county, justices, assigned to keep the peace (the said J. K. then and there being an inhabitant and resident of said township of P.), was duly constituted and appointed by the said M. B., etc., to be constable of, etc., from, etc., for the term of one year then next following, whereof, the said J. K., on, etc., at, etc., had notice. Nevertheless, the said J. K., his duty in this behalf not regarding, but intending the due execution of justice, as much as in him lay, to hinder and retard, from, etc., to, etc., at, etc., the office of constable of, etc., on himself to take and execute, wilfully, obstinately, and contemptuously hath altogether refused and denied, to the manifest contempt and hinderance of justice, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(920) *For refusing to take the office of chief constable, being duly elected at the quarter sessions.*(h)

That at the general quarter sessions of the peace holden at (*caption of the session*), one A. B., of the parish of C., within the hundred of O., in the county of M. aforesaid, yeoman, then and long before being an inhabitant, and residing in the said parish of C., within the hundred and county aforesaid, and an able and proper person to execute the office of chief constable within the said hundred was then and there, by the justices above named, at the same session, in due manner elected(*i*) to be one of the chief constables of the hundred aforesaid, in the room and instead of one C. D., whereof he the said A. B. afterwards, to wit, on, etc., at, etc., within the hundred and county aforesaid, had notice, and afterwards, to wit, on, etc., at, etc., was summoned before the said justices at, etc., to be sworn into his said

(g) Drawn by Wm. Bradford, Esq., when attorney-general of Pennsylvania.

(h) Dickinson's Q. S. 6th ed. 429.

(i) *Ib.* See *R. v. MacArthur*, Peake's N. P. C. acc. The special circumstances of the election, and of the notice of it, must be set forth. 2 Hawk. c. 10, s. 46; *Bac. Abr. tit. Constable* (A).

office(*j*) of chief constable of the said hundred of ; nevertheless, the said A. B., his duty in that behalf not regarding, but contriving and intending wholly to bring contempt on the said office of chief constable, on, etc., and continually afterwards until the day of the taking of this inquisition, at the parish aforesaid, within the hundred and county aforesaid, unlawfully, wilfully, obstinately, and contemptuously did wholly neglect and refuse to take upon himself and to execute the said office of chief constable, within the said hundred of O. in the county aforesaid; to the great hinderance of public justice, and against, etc. (*Conclude as in book 1, chapter 3.*)

(921) *Against a jailer for a voluntary escape.*(*k*)

That heretofore, to wit, at the general quarter sessions of the peace, holden at (*so continuing the record of the conviction of the party who escaped, stating it however in the past and not in the present tense; then proceed thus*): as by the record thereof more fully and at large appears; which said judgment still remains in full force and effect, and not in the least reversed or made void.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that afterwards, to wit, at the said general quarter sessions of the peace above mentioned, he the said J. N. was then and there committed to the care and custody of J. S., he the said J. S. then and still being keeper of the common gaol in and for the said county of Berks, there to be kept and imprisoned in the gaol aforesaid, according to and in pursuance of the judgment and sentence aforesaid; and the

(*j*) The summons should be stated according to fact. See *Prig's case*, Aleyn's R. 78, acted on in *Fortese*, Rep. 127. Dickinson's Q. S. 6th ed. 430.

Refusing to accept offices. The refusal to accept office, which parties are liable to serve and to which they are duly appointed, is an indictable offence. Thus a person duly chosen is indictable, for refusing to take upon himself the office of constable of a parish which he inhabits. *R. v. Harper*, 5 Mod. 96. Refusing to take the oath of office is *prima facie* evidence of refusal to take on himself the execution of it, and that refusal need not be stated in the indictment. *R. v. Brain*, 3 B. & Ad. 614. Or the office of overseer of the poor (*R. v. Jones*, 2 Str. 1145), or any other ministerial office; but notice of the appointment must first be given him; and the indictment must show the duty he has violated, by setting out the mode in which he was appointed, and how he became liable to serve. *R. v. Harper*, 5 Mod. 96.

(*k*) Arch. C. P. 5th Am. ed. 654. See Wh. Cr. L. 8th ed. § 1667.

said J. S. the said J. N. then and there had in the custody of him, the said J. S., for the cause aforesaid, in the gaol aforesaid.

And the jurors first aforesaid, upon their oath aforesaid, do further present, that the said J. S., of the parish of L., in the said county of Berks, yeoman, afterwards, and before the expiration of the six calendar months for which the said J. N. was so ordered to be imprisoned as aforesaid, and whilst the said J. N. was so in the custody of the said J. S., as such keeper of the said common gaol as aforesaid, to wit, on, etc., at, etc., feloniously (*if the offence for which J. N. was convicted was a felony*), unlawfully, voluntarily, and contemptuously did permit and suffer the said J. N. to escape and go at large whithersoever he would ; whereby the said J. N. did then and there escape out of the said prison and go at large whithersoever he would ; in contempt of our said lady the queen and her laws, contrary to the duty of the said J. S., so being keeper of the gaol aforesaid, in manifest hinderance of justice, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(922) *Same where the party escaping was committed by a judge as a fugitive from justice.(l)*

That on, etc., A. V. P., being one of the judges of the said commonwealth under the constitution and laws thereof, and

(l) This indictment was prosecuted in Philadelphia, at July T. 1847, by Mr. Champneys, then attorney-general of Pennsylvania. The defendant was acquitted.

The second count, which is very elaborate, is as follows :—

“And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that T. G. P., being governor of the state of Maryland, heretofore, to wit, on, etc., and according to the constitution and laws of the United States, gave information to his excellency F. R. S., then and now governor of the commonwealth of Pennsylvania, that a certain I. B., late of, etc., in the said state of Maryland, stood charged upon the affidavit of A. S. with the crime of an assault, with intent to kill him the said A. S. ; and the said T. G. P., so being governor of the said state of Maryland, did at the same time and in manner aforesaid further request that he the said F. R. S., so being governor of this commonwealth, would cause the said I. B. to be apprehended, secured, and delivered up to J. Z., as agent on the part of the said state of Maryland, as a fugitive from justice, to be removed for trial to the said state of Maryland, having jurisdiction of his crime aforesaid, agreeably to the constitution of the United States and the provision of an act of congress, passed the twelfth day of February, seventeen hundred and ninety-three ; and further, that the said T. G. P., so being governor of the said state of Maryland, on, etc., in and by a certain paper instrument in writing and printing, under the hand of the said T. G. P.,

one of the associate judges of this honorable court, in due form of law, did make his warrant of commitment under his hand

so being governor as aforesaid, and the great seal of the said state of Maryland, duly attested by W. T. W., then secretary of the said state of Maryland, did authorize and empower the said J. Z. to take and receive the said I. B., a fugitive from justice as aforesaid, and convey him to the state of Maryland, there to be dealt with according to law; and the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said F. R. S., so being governor of the said commonwealth, afterwards, to wit, on, etc., issued a certain writ, warrant, and mandate, bearing date the day and year last aforesaid, at Harrisburg, in this state, under the hand of him the said F. (so being governor aforesaid), and the great seal of this commonwealth, duly attested by J. M., then and now secretary of the said commonwealth, directed to A. V. P., Esq., an associate judge of the court of common pleas for the city and county of Philadelphia, or to any other judge or justice of the peace of this commonwealth, reciting therein the information given by the said T. G. P., governor as aforesaid, to him the said F. R. S., governor as aforesaid, and the request of him the said T. G. P., so being governor as aforesaid, as the same are above particularly set forth, in and by which said writ, warrant, and mandate, he the said F. R. S., so being governor as aforesaid, did authorize and require him the said A. V. P., so being associate judge as aforesaid, or any other judge or justice of the peace in this commonwealth as aforesaid, to issue a warrant in the form of law, directed to any constable or other proper officer for the apprehending and securing the said I. B., and that when secured, he the said A. V. P., so being associate judge as aforesaid, or any other judge or justice of the peace of this commonwealth, would cause him the said I. B. to be delivered up to the said J. Z., agent as aforesaid, to the intent that he might be removed from this state into the said state of Maryland, having jurisdiction of his crime, the said agent peaceably and lawfully behaving. Which said writ, warrant, and mandate, on the day and year last aforesaid, he the said F. R. S., then being governor as aforesaid, sent and transmitted to the said A. V. P., so being associate judge as aforesaid, by whom it was duly received, to wit, on, etc., at, etc.

“ And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that afterwards, to wit, on, etc., at, etc., the said A. V. P., so being associate judge of the court of common pleas for the city and county aforesaid, in pursuance of the command in the said writ, warrant, and mandate of the said F. R. S., governor as aforesaid, issued his warrant for the arrest of the said I. B., bearing date the day and year last aforesaid, at, etc., under the hand and seal of him the said A. V. P., so being associate judge as aforesaid, directed to J. H. B., then and there being one of the officers of the police of Philadelphia, acting under the authority of the mayor of the said city; and the said J. Z., so being agent of the said state of Maryland for the purposes aforesaid; which said warrant is in these words and figures, to wit:—

“ “City and County of Philadelphia, ss.

“ “The Commonwealth of Pennsylvania,

“ “To J. H. B., or J. Z., Greeting:

“ “Whereas his excellency F. R. S., governor of the commonwealth, has issued his warrant to me the subscriber, one of the judges of the court of common pleas of the said county, setting forth that a certain I. B., late of, etc., in the state of Maryland, stands charged upon the affidavit of A. S., with the crime of an assault with intent to kill him, and the said I. B. is a fugitive from justice, and authorizing and requiring me to issue a warrant in due form of law, directed to any constable or other proper officer, to apprehend and secure the said I. B., and when so secured to cause him to be delivered to J. Z., agent

and the seal of this honorable court, to wit, at, etc., bearing date the day and year aforesaid, which said warrant of com-

from the state of Maryland. These are therefore to command you the said B. and Z., or either of you, to take the said I. B. and bring him forthwith before the subscriber, to answer said charge, and to be further dealt with according to law.

Witness my hand and seal, at, etc., on, etc.

“ ‘A. V. P.’ ”

“ By virtue of which said warrant, they the said J. H. B. and J. Z., acting as aforesaid, arrested and secured the said I. B., named in the information of the said governor of the state of Maryland, and the writ, warrant, and mandate of the said governor of Pennsylvania, in the charge aforesaid, and held and detained him the said I. B. in the charge and keeping of the said J. H. B. and J. Z., acting as aforesaid; and the said I. B., being so held and detained, presented his petition over the mark of him the said I. B. to the said A. V. P., so being associate judge as aforesaid, setting forth that the said I. B. was illegally deprived of his liberty, and praying that he the said A. V. P., so being associate judge as aforesaid, would grant him the said I. B. a writ of *habeas corpus* to relieve the said I. B., from the said detention and restraint. Whereupon the said A. V. P., so being associate judge as aforesaid, on the day and year last aforesaid, at the county aforesaid, allowed the said writ of *habeas corpus*, which said writ of *habeas corpus* did thereupon issue, to wit, on, etc., at, etc., out of the said court of common pleas, duly signed and sealed with the seal of the said court, directed to J. H. B., commanding him the said J. H. B., that the body of him the said I. B., under his the said J. H. B.'s custody detained, by whatsoever name the said I. B. might be detained, together with the day and cause of his being taken and detained, he the said J. H. B. have before him the said A. V. P., so being an associate judge of the said court, forthwith in the room of the said court in the said city immediately, then and there to do, submit, and receive whatsoever he the said A. V. P., so being associate judge as aforesaid, should then and there consider in that behalf. In obedience to the command of which said writ of *habeas corpus*, he the said J. H. B. did then and there bring immediately the body of the said I. B. before the said judge, at the place named as aforesaid, with a return of the cause of the detainer of the said I. B. written and indorsed on the back of the said writ of *habeas corpus*, over the signature of him the said J. H. B., in the words following, to wit:—

“ ‘The within named I. B. is detained by virtue of a requisition of his excellency governor T. G. P., of Maryland, on the governor of Pennsylvania, who issued his warrant for the arrest of the said I. B. as a fugitive from justice from the state of Maryland, charged with an assault and battery with intent to kill.

“ ‘J. H. B., 2d Lt. of Police.

“ ‘Philadelphia, etc.

To Judge P.’ ”

“ Whereupon the said A. V. P., so being associate judge as aforesaid, on, etc., at, etc., heard and examined the said charges and the complaint of the said I. B., and afterwards, to wit, on, etc., at, etc., committed the said I. B. to the prison for the said city and county of Philadelphia, for a further hearing before him the said A. V. P., so being an associate judge as aforesaid, to answer the said charges before him the said A. V. P., so being an associate judge as aforesaid, on, etc., in the quarter sessions court-room, and did then and there, to wit, on, etc., make out his warrant of commitment in due form of law, under the hand of him the said A. V. P., so being associate judge as aforesaid, and the seal of the court of quarter sessions of the peace for the city and county of Philadelphia, of which said court he the said A. V. P. was then and there likewise an associate judge, to wit, at the county aforesaid, bearing date the day and year last aforesaid; which said warrant of commitment was delivered to A. F., then being the keeper and superintendent of the prison for the said city and county of Philadelphia,

mitment was delivered to A. F., then being the keeper and superintendent of the prison for the said city and county of Philadelphia, in and by which said warrant he the said A. V. P., so being judge and justice as aforesaid, certified that on the day and year aforesaid one I. B. was committed to the said prison for a further hearing, to answer the charge of being a fugitive from justice from the state of Maryland, until, etc.; and he the said I. B. to stand committed until judgment be fully complied with, as by the said warrant more fully appears. By virtue of which said warrant of commitment, afterwards, to wit, on, etc., A. F., then being the keeper and superintendent of the said prison for the said city and county, did receive the said I. B. into his custody in the said prison for the said city and county, situate in the said county, and did also take and receive the said warrant of commitment.

And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said A. F., late of, etc., so being keeper of the said prison for the said city and county, and having the said I. B. in his custody in the said prison on that occasion, afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, unlawfully, voluntarily, and contemptuously did permit and suffer the said I. B. (so being a prisoner committed to the said prison as aforesaid), to escape

in and by which said warrant he the said A. V. P., so being judge and justice as aforesaid, certified that on the day and year aforesaid the said I. B. was committed to the said prison for a further hearing, to answer the charge of being a fugitive from justice from the state of Maryland, until, etc., to wit, etc., in the room of the said court; and he the said I. to stand committed until judgment be fully complied with, as by the said warrant more fully appears. By virtue of which said warrant of commitment, afterwards, to wit, on, etc., aforesaid, at the county aforesaid, A. F., being the keeper and superintendent of the said prison for the said city and county, did receive the said I. B. into his custody in the said prison for the said city and county, situate in the said county, and did also take and receive the said warrant of commitment. And the inquest aforesaid, on their oaths and affirmations aforesaid, do further present, that the said A. F., late of the said county, yeoman, so being keeper of the said prison for the said city and county, and having the said I. B. in his custody in the said prison on that occasion, afterwards, to wit, on, etc., at the county aforesaid, and within the jurisdiction of this court, unlawfully and negligently did permit and suffer the said I. B., so being a prisoner committed to the said prison as aforesaid, to escape and go at large from and out of the custody of him the said A. F. out of the said prison, wheresoever he would, whereby the said I. B. did then and there escape out of the said prison, and go at large whithersoever he would, to the great hinderance and obstruction of justice, in contempt, etc., to the evil example, etc., and against, etc."

and go at large from and out of the custody of him the said A. F., out of the said prison, wheresoever he would, whereby the said I. B. did then and there escape out of the said prison and go at large withersoever he would, to the great hinderance and obstruction of justice, in contempt of the laws of this commonwealth, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(923) *Against a constable for a negligent escape.*(m)

That on, etc., at, etc., J. S., then being one of the constables of the said parish, brought one J. N. before A. C., Esq., then and yet being one of the justices of our said lady the queen, assigned to keep the peace for our said lady the queen in and for the county aforesaid, and also to hear and determine divers felonies, trespasses, and other misdeeds committed in the said county; and the said J. N. then and there was charged before the said A. C. by one C. H., spinster, upon the oath of the said C. H., that he the said J. N. had then lately before violently, and against her will, feloniously ravished and carnally known her the said C. H.; and the said J. N. was then and there examined before the said A. C., the justice aforesaid, touching the said offence so to him charged as aforesaid; upon which the said A. C., the justice aforesaid, did then and there make a certain warrant under his hand and seal, in due form of law, bearing date the said, etc., directed to the keeper of Newgate or his deputy, commanding him the said keeper or his deputy that he should receive into his custody the said J. N., brought before him and charged upon the oath of the said C. H. with the premises above specified; and the said justice by the said warrant did command the said keeper of Newgate or his deputy to safely keep him the said J. N. there until he by due course of law should be discharged; which said warrant, afterwards, to wit, on, etc., at, etc., was delivered to the said J. S., then being one of the constables of the said parish as aforesaid, and then and there having the said J. N. in his custody for the cause aforesaid; and the said J. S. was then and there commanded by the said A. C., the justice aforesaid, to convey the said J. N. without delay to

(m) Arch. C. P. 5th Am. ed. 652. See Wh. Cr. L. 8th ed. 1667.

the said gaol of Newgate, and to deliver him the said J. N. to the keeper of the said gaol or his deputy, together with the warrant aforesaid. * And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., late, etc., baker, afterwards, to wit, on, etc., then being one of the constables of the said parish as aforesaid, and then having the said J. N. in his custody for the cause aforesaid, at, etc., the said J. N. out of the custody of him the said J. S. unlawfully and negligently did permit to escape and go at large whithersoever he would, whereby the said J. N. did then and there escape and go at large whithersoever he would, to the great hinderance of justice, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(924) *Against a prisoner for escape out of custody of constable.*(n)

(*State the charge before the magistrate, the warrant of commitment, and the defendant's being in the custody of J. S., as in the last precedent, to the *, and then proceed thus*): and the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. N., late, etc., laborer, so being in the custody of the said J. S., under and by virtue of the warrant aforesaid, afterwards, and whilst he continued in such custody, and before he was delivered by the said J. S. to the said keeper of Newgate or his deputy, to wit, on, etc., at, etc., in the county aforesaid, out of the custody of the said J. S. unlawfully did escape and go at large whithersoever he would, to the great hinderance of justice, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(925) *For inflicting cruel and unusual punishment on one of the crew of a vessel, etc.*(o)

That A. B., late of, etc., heretofore, to wit, on, etc., with force and arms, on the high seas (*or otherwise*), out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a

(n) Arch. C. P. 5th Am. ed. 653.

(o) See Wh. Cr. L. 8th ed. § 1872. Under the act of 1850 the indictment should be for beating and wounding, not for cruel and unusual punishment. Wh. Cr. L. 8th ed. § 1873.

called the in and upon one then and there being one of the crew of said vessel, did then and there make an assault, and from malice, hatred, and revenge, and without any justifiable cause, then and there did inflict upon the said cruel and unusual punishment, he the said (*the offender*) then and there being (*state whether the master, officer, or one of the crew*) of the said American vessel, being a called the to the great damage of the said against, etc.(p) (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first, substituting*): “did then and there make an assault, and from malice, hatred, and revenge, and without any justifiable cause, then and there did beat and wound (*or as the case may be*) the said he the said,” etc., for “did then and there make an assault, and from malice, hatred, and revenge, and without any justifiable cause, then and there did inflict upon the said cruel and unusual punishment, he the said,” etc.

Third count.

That A. B., late of, etc., heretofore, to wit, on, etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the in and upon one then and there being one of the crew (*or otherwise*) of the said American vessel, did then and there make an assault, and from malice, hatred, and revenge, and without justifiable cause, then and there did beat, wound, and imprison (*or as the case may be*) the said and upon the said then and there being of the said vessel, being a called the then and there did inflict cruel and unusual punishment; he the said then and there being of the said American vessel, being a called the to the great damage of the said against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see ante, 17, 18, 181, n., 239, n.*)

(926) *Against same for same, the punishment being beating and wounding, etc.*(*q*¹)

That W. H. G., of, etc., in said district, master mariner, on, etc., on the high seas, within the admiralty and maritime jurisdiction of the said United States, in and on board of the "Richard Mitchell," the same then and there being an American ship or vessel, and belonging to certain persons citizens of the said United States, whose names are to the jurors aforesaid as yet unknown, with force and arms, an assault did make in and upon one J. P. C.; and him the said C. then and there, from malice, hatred, and revenge, and without justifiable cause, did beat and wound, he the said C. then and there being one of the crew of said ship or vessel, and he the said G. then and there being the master thereof, against, etc. (*Conclude as in book 1, chapter 3.*)

(927) *Second count. Specifying the punishment more minutely.*

That W. H. G., of, etc., in said district, master mariner, on, etc., on the high seas, within the admiralty and maritime jurisdiction of the said United States, in and on board of the "Richard Mitchell," the same then and there being an American ship or vessel, and belonging to certain persons citizens of the said United States, whose names are to the jurors aforesaid as yet unknown, with force and arms, another assault did make in and upon the said J. P. C., and then and there, from malice, hatred, and revenge, and without justifiable cause, did strip and expose naked down to the middle the person of him the said C., and did then and there inflict on the naked back of him the said C. seventeen lashes, with a certain instrument called "the cats," and then and there, after the infliction of said lashes as aforesaid, did pour a quantity of salt brine upon the said naked back of him the said C.; which said stripping and exposing naked the person of him the said C. as aforesaid, and said inflicting of said lashes as aforesaid, and which said pouring of salt brine as aforesaid upon the naked back of said C., were a cruel and unusual punishment, against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see ante, 17, 18, 181, n., 239, n.*)

(*q*¹) This form was sustained in Massachusetts after a conviction.

(928) *Confining a boy in run of a ship, etc.*

That A. B., of, etc., in the district of M., master mariner, in on the high seas, within the admiralty and maritime jurisdiction of the United States, and on board of the same then and there being an American ship or vessel of the United States, with force and arms, an assault did make in and upon one and him the said then and there, from malice, hatred, and revenge, and without justifiable cause, did imprison in the run of said ship or vessel, and detain there so imprisoned for a long space of time, to wit, from the said to the day of then next ensuing; he the said then and there being the master of said vessel, and he the said then and there being one of the crew thereof, against, etc. (*Conclude as in book 1, chapter 3.*)

(929) *Second count. Refusing suitable food.*

That A. B., of, etc., in the district of M., master mariner, on and from that day to then next ensuing, on the high seas, within the admiralty and maritime jurisdiction of the United States, in and on board of the the same then and there being an American ship or vessel of the United States, with force and arms, did withhold, from malice, hatred, and revenge, and without justifiable cause, suitable food and nourishment from one he the said then and there being the master of said ship or vessel, and he the said then and there being one of the crew thereof, against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(930) *Another form for withholding suitable food, etc.*

That W. L. C., of in said district, master mariner, on and from that day until then next following, on the high seas, within the admiralty and maritime jurisdiction of the said United States, and out of the jurisdiction of any particular state thereof, in and on board the ship "Farewell," the same then and there being an American ship or vessel, belonging to certain persons, citizens of the said United States, whose names are to the jurors aforesaid as yet unknown, with force and arms,

from malice, hatred, and revenge, and without justifiable cause, did withhold suitable food and nourishment from G. W. and (eleven others), they the said W. (*et al.*) then and there being the crew of said ship or vessel, and he the said W. L. C. then and there being master thereof, against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(931) *For forcing, etc., a seaman ashore in a foreign port.*(*q*)

That A. B., late of, etc., mariner, heretofore, on, etc., at (*specify definitely the particular name of the place and country where the seaman was left*), did, during his being abroad, unlawfully, wrongfully, maliciously, and without justifiable cause, force on shore and leave behind at (*as before mentioned*), aforesaid, one he the said then and there being a mariner and seaman, and belonging to the company of a certain American vessel, being a called the belonging in whole (or in part) to a certain person or persons, whose name or names are to the said jurors unknown, then and still being a citizen and citizens of the said United States of America, of which said vessel he the said A. B. was then and there master and commander, against, etc. (*Conclude as in book 1, chapter 3.*)

(932) *Second count. Same in another form.*

That the said A. B., heretofore, to wit, on, etc., at, etc., he the said then and there being the master and commander of a certain American vessel, being a called the belonging in whole or in part to a certain person or persons whose name or names are to the said jurors unknown, then and still being a citizen or citizens of the said United States, did, during his being abroad, unlawfully, wrongfully, maliciously, and without justifiable cause, force on shore at (*as above mentioned*), aforesaid, one C. D., he the said then and there being a mariner of the said vessel, being a called the and the voyage for which he the said C. D. had been engaged not being then completed, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*q*) See Wh. Cr. L. 8th ed. § 1885; Rev. Stat. § 5363.

(933) *Third count. Leaving behind seaman.*

(*Like second count, except instead of*): "force on shore at (*as above mentioned*), aforesaid," insert "leave behind at a foreign port (or place), to wit, the said" (*as is mentioned in preceding counts*).

(*For final counts, see 17, 18, 181, n., 239, n.*)

(934) *Leaving seaman in foreign port.(r)*

That B. C. S., late of, etc., master mariner, on, etc., at a foreign port or place called Valparaiso, in South America, then and there being the master and commander of the "Henry Clay," the same then and there being a ship, etc., of the United States, and belonging in whole (or in part) to certain persons, citizens of the United States, whose names are to the jurors aforesaid as yet unknown, during her being abroad at said foreign port or place called Valparaiso, out of the territory and dominion of the United States, unlawfully, wrongfully, maliciously and without justifiable cause did leave behind in said foreign port or place called Valparaiso one J. S., he the said J. S. then and there being a mariner and seaman of said vessel, and the voyage for which he, the said J. S., had been engaged not being then completed, against, etc. (*Conclude as in book 1, chapter 3.*)

(935) *Refusing to bring home a seaman.*

That B. C. S., late, etc., master mariner, on, etc., at a foreign port or place called Valparaiso, in South America, then and there being the master and commander of the "Henry Clay," the same then and there being a ship, etc., of the United States, and belonging in whole (or in part) to certain persons, citizens of the United States, whose names are to the jurors aforesaid as yet unknown, during his being abroad at the said foreign port or place called Valparaiso, maliciously and without justifiable cause did refuse to bring home again from said foreign port or place called Valparaiso one J. S., he the said J. S. then and there being a mariner of said ship, and by said B. C. S. carried

(r) See Wh. Cr. L. 8th ed. § 1887. This form is essentially the same as that given in Arch. C. P. 19th ed. p. 741.

out with him from the said United States in said ship or vessel, and then and there being in a condition to return, and willing to return when said B. C. S. was ready to proceed on his homeward voyage from said foreign port or place, against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(936) *Another form for forcing on shore.(s)*

That heretofore, to wit, on, etc., one J. C. T., then being the master of a ship, to wit, the ship "Washington," then and there belonging to a citizen and citizens of the United States, during his the said T. being abroad, to wit, at a foreign port, Calcutta, did unlawfully, wrongfully, maliciously, and without justifiable cause force W. S. B., then and there being an officer of the said ship, to wit, chief mate of the said ship "Washington," on shore in the said foreign port of Calcutta, in order to leave him behind in such foreign port, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(937) *Against a captain of a vessel, for bringing into the port a person with an infectious disease, under the Pennsylvania act.(t)*

That A. E., late of, etc., on, etc., being master and commander of the schooner "St. Andrews," did arrive with the said vessel from beyond seas, at the port of P., and then and there had on board of the said vessel a certain W. M., then and there disordered with a certain infectious disease called a putrid fever; and that N. F., then and still being the officer appointed by virtue of the act, entitled "A supplement to the act entitled an act for imposing a duty on persons convicted of heinous crimes, and to prevent poor and impotent persons being imported into this province," together with J. H., then and still being one of the physicians appointed by virtue of the act of general assembly, entitled "An act to prevent infectious diseases from being

(s) *United States v. Taylor*, Phil. Oct. Sess. 1837. The defendant was acquitted. The indictment was in the main framed by Mr. John M. Read, then district attorney, afterwards chief justice of Pennsylvania.

See on this topic *U. S. v. Ruggles*, 5 Mason, 192; *U. S. v. Netcher*, 1 Story, 367. Rev. Stat. § 5363.

(t) Drawn by Mr. Bradford, attorney general of Pennsylvania in 1790.

brought into this province," afterwards, to wit, on the same day and year aforesaid, and at the county aforesaid, did repair on board the same schooner or vessel, to inspect the same with respect to the health and disease of the people on board the same vessel, and to do and perform the duties to their respective offices belonging; and that he the said A. E., then and there well knowing the same W. M. to be so as aforesaid on board his said schooner or vessel, and to be disordered with the infectious disease aforesaid, then and there knowingly and willingly did conceal the same from the said officer and physician, and then and there did not make a just and true discovery of the sickly and disordered state and condition of the said W. M. to the said officer and physician, but did neglect so to do, to the great damage of the health and lives of the citizens of this state, contrary, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(938) *Against a captain of a vessel, for not providing wholesome meat for his passengers.*(u)

That E. C., late of, etc., mariner, on, etc., being master and commander of the brigantine "Cunningham," bound from Londonderry, beyond seas, to the port of Philadelphia, and having charge of the same, on, etc., and within the jurisdiction of this court, did import into the river Delaware, from the port of Londonderry aforesaid, three hundred and forty passengers and servants, and that he the said E. C., so being master and commander of the same ship, did neglect and omit to provide and supply the same passengers and servants, during the voyage aforesaid, with good and wholesome meat, drink, and other necessaries, and did wholly omit and neglect, during the said voyage, to provide and supply any vinegar, to wash and cleanse the said vessel, and for the said passengers and servants to use on board, during the said voyage from Londonderry aforesaid, and that the said passengers and servants were not, during the voyage aforesaid, provided and supplied with good and wholesome meat, drink, and other necessaries, nor with any vinegar for the purposes aforesaid, and that the said passengers and servants then and there were a greater number than were well supplied and

(u) Drawn by Mr. Bradford in 1790. See Wh. Cr. L. 8th ed. § 1586.

provided with the meats, drinks, vinegar, and necessaries aforesaid, by reason whereof many of the said passengers became sick and in great jeopardy of their lives, to the evil example, etc., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(938a) *Breach of pilot laws in Massachusetts.*

That B. F. R., of, etc., mariner, at, etc., on, etc., he the said R. then and there being a person not having a branch commission and warrant as a pilot or pilot's apprentice, for the harbor of Boston aforesaid, did undertake to pilot into the harbor of Boston aforesaid a certain foreign vessel, called the barque "Empress," being a vessel of the burden of more than two hundred tons, and coming from the port of New York, in the state of New York, and not from a port in the state of Massachusetts, and not being a fishing vessel, and not being a public ship belonging to the United States of America, nor a ship of war, but a merchant ship vessel, and certain branch pilots, to wit (*set forth names of pilots*), having offered their services to the master of said barque "Empress," said barque being bound then into the harbor of Boston aforesaid, before said vessel had passed a line drawn from Harding's Rocks to the Outer Graves, and from thence to Nahant Head, whereby and by force of the statute in such case made and provided, he the said B. F. R. hath forfeited a penalty for the said offence not exceeding fifty dollars, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

LIBEL.

CHAPTER VII.

LIBEL.(a)

- (939) General frame of indictment.
- (940) Libel on an individual generally.
- (941) Charging him with scuttling a ship, etc.
- (942) Posting a man as a scoundrel, etc.
- (943) Libel upon an attorney, contained in a letter.
- (944) Publishing an *ex parte* statement of an examination before a magistrate for an offence with which the defendant was charged.
- (945) Information for writing and publishing a libel against the king and government.
- (946) For publishing the same in other newspapers.
- (947) Libel on the president of the United States.
- (948) Another form for same.
- (949) Libel on a judge and jury when in the execution of their duties.
- (950) Libel on a sheriff, attributing to him improper motives and conduct, in getting up petitions, etc., for the locating of the seat of justice in a particular county.
- (951) Libel on a justice of the police court in Boston, etc.
- (952) Libel on an officer, said libel consisting of a paper alleged to have been read by the defendant at a public meeting, but which was in the defendant's possession, or destroyed, and consequently was not produced to the grand jury.
- (953) Seditious libel. The libellous matter consisting in an address to the electors of Westminster, of which the defendant was the representative, charging the government with trampling upon the people, etc.
- (954) Publishing at a time of popular commotion resolutions attacking the government as blood-thirsty, etc.
- (955) Libel in German, in the circuit court of the United States.
- (956) Libel in French, against a foreign potentate.
- (957) Sending a letter to a commissioner of revenue in the United States containing corrupt proposals.
- (958) Writing a seditious letter with intent to excite fresh disturbance in a district in a state of insurrection.
- (959) Hanging a man in effigy.

(a) See Wh. Cr. L. 8th ed. § 1594 *et seq.*

- (960) Insulting a justice in the execution of his office.
- (960a) Scandalous words to a magistrate.
- (961) For seditious words.
- (962) Another form for same.
- (963) Uttering blasphemous language as to God.
- (964) Same under Rev. Sts. Mass. ch. 130, § 15.
- (965) Blaspheming Jesus Christ.
- (966) Blaspheming the Holy Ghost.
- (966a) Using indecent language in presence of female.
- (967) Composing and publishing blasphemous libel.
- (968) Obscene libel. First count, not setting forth libellous matter.
- (969) Second count. Publishing an obscene picture.
- (970) Exhibiting obscene pictures.
- (971) Against the printer of a newspaper for publishing an advertisement by a married woman offering to become a mistress.
- (972) Indictment for threatening to accuse of an infamous crime.
- (973) Sending a letter, threatening to accuse a person of a crime. Mass. Rev. Sts. ch. 125, § 17.
- (974) Sending a letter, threatening to accuse a person of a crime. Mass. Rev. Sts. ch. 125, § 17.
- (975) Sending a threatening letter.
- (975a) Another form under English statute.
- (975b) Letter threatening to accuse under English statute.
- (975c) Threats in order to extort under English statute.
- (975d) Threatening to publish libel with intent to extort under English statute.
- (975e) Obtaining signature by threats.
- (975f) Threats under Indiana statute.
- (975g) Threatening property with menaces.

(939) *General frame of indictment.*

That A. B., of, etc., on, etc.,^(b) unlawfully and maliciously contriving and intending to vilify and defame one C. D., and to bring him into public scandal and disgrace, and to injure and aggrieve him the said C. D., on, etc., at, etc., unlawfully and maliciously did compose and publish,^(c) and cause and procure^(d) to be composed and published, a certain false, scandalous, mali-

(b) As to time, see *supra*, form 2, vol. i. p. 13.

(c) As composing or writing a libel merely does not seem to be an offence unless the libel be afterwards published, the indictment must charge a publication. *R. v. Burdett*, 4 B. & Al. 95; Wh. Cr. L. 8th ed. § 1655. Where, however, a libel is written in the county of L., with intent to publish it, and is afterwards published in the county of M., the defendant may be indicted for a misdemeanor in either county. *Ib.*; *by three judges*, Bayley, J., *dubitante*.

(d) This joinder is not bad for duplicity. See notes to form 2, vol. i. pp. 25, 27.

cious, and defamatory libel of and concerning him,^(c) the said C. D., containing therein, among other things, the false, malicious, defamatory, and libellous words and matters following, that is to say^(f) (*here give the libellous matter in the manner stated in the*

(e) It should be stated that the libel was *of and concerning the prosecutor* (4 M. & S. 164; 7 Mod. 400; 4 B. & A. 314), and if necessary, what were the circumstances of the publication. *State v. Henderson*, 1 Richardson, 179; Wh. Cr. L. 8th ed. § 1658. On an indictment for a libel against Jane Cox, which libel described her as the only daughter of the widow Roach, the innuendo in the indictment stated the identity of Mrs. R.'s daughter and of the prosecutrix Mrs. Cox: it was held that it was not necessary to prove that the prosecutrix was the only daughter. *State v. Perrin*, 1 Tr. Con. Rep. 446; 3 Brevard, 152. It has been determined that it is a proper question to ask a witness whether, in his opinion, the alleged libellous words referred to the party alleged to be libelled. *Com. v. Buckingham*, Thacher's C. C. 29. In an indictment for a libel against A. S., omitting to allege that the libel was "of and concerning A. S.," it was held that such omission was not supplied by its being alleged in the introductory part, "that the defendant, intending to vilify A. S., he having been mayor of, etc., and to cause it to be believed, that as such mayor he had practised corruption and had been guilty of abuse in respect to granting a license to retail beer," etc., and concluding, "to the injury and disgrace of A. S.," etc., although the innuendos pointed the different parts of the libel to A. S. and J. L., and to the granting the license. 4 M. & S. 164. See also *Clement v. Fisher*, 7 B. & C. 459; *State v. Nease*, 2 Taylor's (N. C.) R. 270. But this statement does not appear necessary where the libel is stated to have been addressed to the plaintiff and written in the second person, "You," etc. 1 Saund. 242, n. 3; Cro. J. 331. Whenever an inducement of extrinsic matter is necessary to constitute the matter libellous, it is necessary to aver that the libel was *of and concerning such matter* (8 East, 427; 1 Saund. 242-243; n. 3, 4); when not, see *Ld. Raym.* 1480; 2 Lev. 62; Cro. Car. 270.

(f) The alleged libellous matter must be set out correctly. *Wright v. Clement*, 3 B. & Al. 503; *Tabart v. Tipper*, 1 Campb. 352; *Cartwright v. Wright*, 1 D. & R. 230; *State v. Stephens*, Wright's Ohio R. 73; *Com. v. Gillespie*, 7 S. & R. 469; *Com. v. Stow*, 1 Mass. 54; *Com. v. Bailey*, 1 Mass. 62; *State v. Farland*, 3 Halst. 333; *State v. Gustin*, 2 South. R. 749; *State v. Street*, Taylor, 158; *State v. Bradley*, 1 Hay. 403; *State v. Coffey*, N. C. Term R. 272; U. S. v. Hinman, 1 Bald. 292; U. S. v. Britton, 2 Mason, 462; *People v. Franklin*, 3 Johns. C. 299; *Com. v. Searle*, 2 Binn. 232; *State v. Carr*, 5 N. Hamp. 367; *Com. v. Harrison*, 2 Gray, 289; *Com. v. Stevens*, 1 Mass. 203; *Com. v. Parmenter*, 5 Pick. 279; *State v. Molier*, 1 Dev. 263; *State v. Carter*, Conf. (N. C.) R. 210; *State v. Wimberly*, 3 M' Cord, 190; *State v. Twitty*, 2 Hawks, 487; *Com. v. Sweeney*, 10 S. & R. 173; *Com. v. Kearns*, 1 Va. Cases, 109; *State v. Waters*, 3 Brev. 507; Const. Ct. R. 169; *Sedgwick, J.*, 8 Mass. 110; *People v. Badgley*, 16 Wend. 53; *Pendleton v. Com.*, 4 Leigh, 694; *State v. Parker*, 1 Chipman's Vt. R. 298; *State v. Potts*, 4 Halst. 26; *People v. Kingsley*, 2 Cow. 522; *State v. Squires*, 1 Tyler's Vt. R. 147; *Com. v. Holmes*, 17 Mass. 236; *Com. v. Sharpless*, 2 S. & R. 91; *Bucher v. Jarrat*, 3 B. & P. 143; *Howe v. Hall*, 14 East, 275; Wh. Cr. L. 8th ed. § 1656. An indictment charging that the defendant published a libel on the twenty-first of the month, may be supported by proof of a publication on the nineteenth of the same month. But it is otherwise if the indictment has alleged that the libel was published in a paper dated the twenty-first of the month. *Com. v. Varney*, 10 Cush. 402. It is not enough to charge the libel to contain "in substance" the matter following (3 B. & A. 508), or that it was "to the effect following." 2 Salk. 417, 600; 11 Mood. 78, 84, 85; *Com.*

note, and proceed): to the great injury, scandal, and disgrace of the said C. D., and against, etc. (*Conclude as in book 1, chapter 3.*)

v. Sweeney, 10 S. & R. 173; *State v. Walsh*, 2 McCord, 248; *Com. v. Tarbox*, 1 Cush. 66; *State v. Goodman*, 6 Richards, 388; see notes to form 264. The usual methods of introducing the libellous words, as will appear more fully in the precedents which are to follow, are: "in which said (paper, book, or letter, as the case may be) was and is contained, amongst other things, the false, scandalous, defamatory, and libellous words and matter following, of and concerning the said A. B." etc. (2 Stark. on Sland. 383), or did publish, etc., "a certain false, etc., libel, according to the tenor following;" or "containing divers scandalous, etc., matters, according to the tenor following, that is to say" (3 Chit. C. L. 887-8-9), and see the prefatory averments used in cases of forgery, *supra*, 264. The leading case on this point is *King v. Bear*, 2 Salk. 417. The indictment was for composing, writing, making, and collecting several libels *uno quorum continetur inter alia juxta tenorem, et ad effectum sequentum*, and the words were then set out. And it was agreed that *ad effectum* would of itself have been bad, since the court must judge of the words themselves and not of the construction the prosecutor puts upon them; but that the words *juxta tenorem sequentum* import the very words themselves. 2 Salk. 417. And it was held that the words "*ad effectum*" were loose and useless words: but that the words *juxta tenorem*, being of a more certain or strict signification, the force of the latter was not hurt by the former, according to the maxim, "*utile per inutile non vitiatur*." But where an indictment alleged that the defendant published, etc., a libel, etc., "*according to the purpose, effect, and in substance as follows*," it was held that the words "*substance as follows*" vitiated the indictment. *Com. v. Wright*, 1 Cush. 46.

In the same case, that of *Ford v. Bennett* (1 Ld. Raym. 415) was referred to, where, in a special action upon the case against Bennett *et al.*, the plaintiff declared that the defendant, at Saltashe, procured a false and scandalous libel against the plaintiff to be written, under the form of a petition, and the libel was set forth after the words *continetur ad tenorem et ad effectum sequentum*. Two were found guilty, upon which judgment was entered for the plaintiff, and afterwards upon error brought in the exchequer, the judgment was affirmed, the exception taken to the words *ad effectum* having been overruled without consideration. And Holt, C. J., said, that he then thought the judgment to be given with too great precipitation, but he afterwards, upon great consideration, had esteemed it to be very good law. And *King v. Fuller*, Mich. 4 Wm. & Mary, and *King v. Young*, Ib., were cited as authorities in point; and the whole court were of opinion that, notwithstanding the exception, the indictment was good; but that if it had been only *ad effectum sequentum*, it had been ill, because it had not imported that the words were the specific words which were in the libel.

This rule, however, is relaxed in the following cases:—

1. Where the libellous matter is in the defendant's possession, and he, though notified to do so, refuses to produce it. In such a case it will be enough for the jury to aver the fact of such possession, as an excuse for the non-setting forth of the tenor of the libel, and then, as will be done in a form which will be presently given, to set forth the substance. This course was first suggested in the king's bench in *King v. Watson* (2 T. R. 200), where an information was asked against a corporation for a libel, the libellous writing being in the hands of the defendant, and not within the control of the prosecution. The case did not proceed to trial, but it was strongly intimated by Buller, J., that if it should, and the defendant refused to deliver the libellous paper, after notice, it would be enough for the prosecution to prove the substance. And it has since been held, in prosecutions for forgery, that if the prosecutor, a reasonable time before the commencement of the assizes, gives the prisoner notice to produce the alleged forged writing, he is entitled, on non-production, to give secondary evidence of its contents. *R. v. Haworth*, 4 C. & P. 254; *R. v. Hunter*, Ib. 128; *Wh. Cr.*

(940) *Libel on an individual generally.*

That C. D., late, etc., being a person of an envious, evil, and wicked mind, and of a most malicious disposition, and wickedly,

Pl. & Pr. § 176, and in this country it has been frequently laid down that in such cases it is proper and sufficient for the prosecution to aver specially in the indictment the loss of the instrument in question, or a possession and non-production by the defendant. See Sedgwick, J., 8 Mass. 110; *People v. Badgley*, 16 Wend. 53; *Pendleton v. Com.*, 4 Leigh, 694; *U. S. v. Britton*, 2 Mason, 461; *State v. Parker*, 1 Chipman's Vt. R. 298; *State v. Potts*, 4 Halst. 293; *Bucher v. Jarrat*, 3 B. & P. 143; *Howe v. Hall*, 14 East, 275. See notes to form 264, and for a precedent of same, *infra*, 952; *cf.* Wh. Cr. Pl. & Pr. § 176.

2. Where the libellous matter is lost or destroyed, when the same course will be sustained. Wh. Cr. Pl. & Pr. § 176.

3. If the grand jury declare of an indecent libel, "that the same would be offensive to the court here, and improper to be placed on the records thereof," the non-setting forth of the libel will be thereby sufficiently excused. *Com. v. Holmes*, 17 Mass. 336; and see Wh. Cr. L. 8th ed. § 1609, for other cases, and cases given *infra*. Thus in an indictment for publishing an obscene book or picture, it is not necessary that the libel should be set out at large. *State v. Brown*, 1 Williams (Vt.), 619; *Com. v. Holmes*, 17 Mass. 336; *Com. v. De-jardin*, 126 Mass. 46; *Com. v. Sharpless*, 2 S. & R. 91; *People v. Girardin*, 1 Mann. (Mich.) 90. But in such case, however, it is necessary specifically to aver the reason of the omission. *Com. v. Tarbox*, 1 Cush. 66. This view is accepted in England as to indecent prints. *Dugdale v. R.*, Dears. C. C. 64. In *R. v. Bradlaugh*, 38 L. T. (N. S.) 118; L. R. 3 Q. B. D. 607; 14 Cox C. C. 68. it was ruled that an indictment which did not give the words of an alleged obscene libel or excuse their omission was bad. In this case it was noticed by Bramwell, J., that the American authorities excuse the non-setting forth of the libel on the grounds of its obscenity, which allegation was omitted in *R. v. Bradlaugh*. It will not do to say that this excuse is surplusage. An indictment which excuses the non-setting forth of a document on the ground of its loss, or of its destruction by the defendant, is good, though without such an excuse the indictment would be defective. The excuse, therefore, is essential. But, when such an excuse is made, the American cases present an almost unbroken line of authority to the effect that the obscene document need not be copied. *Com. v. Holmes*, 17 Mass. 336; *State v. Brown*, 1 Williams (Vt.), 619; *McNair v. People*, 89 Ill. 441, and *People v. Girardin*, 1 Mann. (Mich.) 90, are direct to this effect. *Com. v. Tarbox*, 1 Cush. 66, reaffirms the principle of *Com. v. Holmes*, but holds that to paste the alleged obscene matter to the indictment is a defective mode of pleading. As affirming *Com. v. Holmes* may also be cited *Com. v. De-jardin*, 126 Mass. 46. On the other hand, in *State v. Hanson*, 23 Tex. 232, an indictment for publishing an obscene document, without giving the words, was held bad. In this case, however, there was no excuse offered, as in *Com. v. Holmes*, for not setting out the libel. *Com. v. Sharpless*, 2 S. & R., was the case of an indecent picture, and the supreme court held that it was not necessary that the picture should be copied on the indictment. The reason, however, is the same as that given in *Com. v. Holmes*—that the court must preserve the "chastity" of its records, and not permit them to be used to perpetuate obscenities. It may be added to this that if an obscene publication were to be considered as exclusively a libel, it might be difficult to resist the conclusion, that as a libel, when indicted as such, it should be spread on the record, supposing that no legitimate excuse be given for the non-setting out. But there is much force in the position that an obscene publication is not so much a libel as an

maliciously, and unlawfully minding, contriving, and intending, as much as in him lay, to injure, oppress, aggrieve, and vilify the

offence against public decency; and if it be the latter, the particularity required in setting forth libels is not necessary. If a mob, for instance, should gather about a religious assembly, disturbing its worship by profane and indecent language, it would not be necessary, it may well be argued, that those profane and indecent words should be set out. Nor is this the only illustration to which we may appeal. An indictment against a common scold need not set forth the words the "scold" was accustomed to use. See argument in *Southern Law Rev.* for 1878, p. 258.

If the libel be in a foreign language, it must be set out in such language, *verbatim*, together with a correct translation, as will appear in one of the following forms. See *Zenobio v. Aztel*, 6 T. R. 162; *Wormoth v. Cramer*, 4 Wend. 394; *Wh. Cr. L.* 8th ed. § 1658.

Parts. If parts of the publication be selected they must be set forth thus: "in a certain part of which said there were and are contained certain false, wicked, malicious, scandalous, seditious, and libellous matters, of and concerning, etc., according to the tenor and effect following, that is to say;"—and then, after setting forth the first extract, introducing the second, preceding it by: "and in a certain other part," etc. See 1 Campb. 350.

The date and publication at the foot of the libel need not be set out. *Com. v. Harrison*, 2 Gray, 289.

Innuendo. Where the matter written is not in itself obviously libellous, it is necessary to render it so by explaining its real meaning by an innuendo.

Its nature and office is to explain the defendant's meaning by reference to such inducement or matter previously expressed in the proceedings (*Shaffer v. Kintzer*, 1 Binn. R. 537, 542; *Bloss v. Tobey*, 2 Pick. (2d ed.) 327, note; *Shely v. Biggs*, 2 Har. & J. 363; *Goodrich v. Wolcott*, 3 Cowp. 236; *Van Vechten v. Hopkins*, 5 Johns. R. 220; *Stow v. Converse*, 4 Com. R. 18); where the intent may be mistaken, or where it cannot be collected from the libel itself (*Cowp.* 629, 683; 5 East, 463); or where the words of the writing are general, ironical, or written by way of allusion or inference, so that in order to show its offensive meaning an innuendo is necessary to connect it with some facts or associations not expressed in words, but which they necessarily presented to the mind. See generally *Wh. Cr. Pl. & Pr.* § 181a, etc.

As an innuendo can explain only in cases where something already appears upon the record to ground the explanation, it cannot of itself change, add to, or enlarge the sense of expressions beyond their usual acceptation and meaning. See 2 Salk. 513; *Cowp.* 684; *Solomon v. Lawson*, 8 Q. B. 825; *Goodrich v. Hooper*, 97 Mass. 1; *Mix v. Woodward*, 12 Conn. 262; *Van Vechten v. Hopkins*, 5 Johns. 211; *State v. Neese*, N. C. T. R. 270; *Bradley v. State*, Walker, 156; *State v. Henderson*, 1 Rich. 179.

It was held in Pennsylvania, in 1870, that where no new essential fact is requisite to the frame of an indictment for libel, which requires to be found by the grand jury as the ground of a colloquium, and where the only object of an innuendo is to give point to the meaning of the language, it is not proper to quash the indictment on the ground that the innuendo may be supposed to carry the meaning of the language beyond the customary meaning of the word. If some of the innuendoes in an indictment for libel extend the meaning of parts too far, but there be others sufficient to give point to it, the jury may convict under the latter alone. *Com. v. Keenan*, 67 Penn. St. 203; *Wh. Cr. Pl. & Pr.* § 181a.

That prefatory averments are necessary to make clear the meaning of ambiguous terms, see *Hall v. Blandy*, 1 Y. & J. 480; *R. v. Yates*, 12 Cox, 233; *State v. Atkins*, 42 Vt. 252; *Van Vechten v. Hopkins*, 5 Johns. 21.

That inducement is not necessary when innuendoes will suffice, see *R. v. Horne*, 2 Cowp. 672; *Woolnosh v. Meadows*, 5 East, 463; *Oldham v. Peake*, 2 W.

good name, fame, credit, and reputation of A. B., a good, peaceable, and worthy subject of our said lord the king, and to bring

Black. 959; Bloss *v.* Tobey, 2 Pick. 320; Goodrich *v.* Davis, 11 Mete. 473; Bowman *v.* Boyer, 2 Pick. 320; Com. *v.* Keenan, 67 Penn. St. 203; Worth *v.* Büttler, 7 Blackf. 251.

That only extrinsic facts need be stated in inducement, see Starkie on Slander, 391; Townshend on Slander, § 308; State *v.* Shelters, 51 Vt. 102; Gosling *v.* Morgan, 32 Penn. St. 273.

In an action for the words "*He is a thief*," you cannot explain the defendant's meaning in the use of the word "*he*," by an innuendo "*meaning the said plaintiff*," or the like, unless something appear previously upon the record to ground that explanation; but if you had previously charged the words to have been spoken of and concerning the plaintiff, then such an innuendo would be correct; for, when it is alleged that the defendant said of the plaintiff "*He is a thief*," this is an evident ground for the explanation given by the innuendo, that the plaintiff was referred to by the word "*he*." R. *v.* Tutchin, 5 St. Tr. 532; Alexander *v.* Angle, 1 C. & J. 143; 1 Roll. Abr. 83, pl. 7, 85, pl. 7; 7 B. & C. 459; 2 Roll. Rep. 244; Cro. Jac. 126-39; Clement *v.* Fisher, 1 Man. & Ry. 281; 1 Sid. 52; 2 Str. 934; 1 Saund. 242, note 3; Goldstein *v.* Foss, 9 D. & R. 197; 6 B. & C. 154; Tomlinson *v.* Brittlebank, 4 B. & Ad. 630; 1 N. & M. 455; Sweetapple *v.* Jesse, 5 B. & Ad. 27; 2 N. & M. 36; Curtis *v.* Curtis, 10 Bing. 447; 4 M. & Scott, 37; Storoman *v.* Dutton, 10 Bing. 502; 4 M. & Scott, 174; Day *v.* Robinson, 1 Ad. & El. 554; 4 N. & M. 884; R. *v.* Bindett, 4 B. & Al. 95; Bradley *v.* State, 1 Walker, 156; State *v.* Neese, N. C. Term R. 270; 2 Salk. 512; Van Vechten *v.* Hopkins, 5 Johns. 211; Cowp. 684; Mix *v.* Woodward, 12 Conn. 262; Usher *v.* Severance, 20 Me. R. 50; Zenobio *v.* Aztel, 6 T. R. 162; Walsh *v.* State, 2 McCord, 285; State *v.* Chase, 1 Walker, 384; State *v.* Henderson, 1 Richardson, 179; State *v.* Perrin, 1 Tr. Con. Rep. 446; 2 Brevard, 474; Barham's case, 4 Co. 20, a; Com. *v.* Buckingham, Thacher's C. C. 29; Miller *v.* Maxwell, 16 Wend. 9; 2 Hill, 472; 12 Johns. 474. Where the plaintiff averred, by way of innuendo, that the defendant in attributing the authorship of a certain article to a "celebrated surgeon of whiskey memory," or to a "noted steam-doctor," meant by the appellations the plaintiff, it was held, notwithstanding the innuendo, that the declaration was bad for want of an averment that the plaintiff was generally known by those appellations, or that the defendant was in the habit of applying them to him, or something to that effect. Miller *v.* Maxwell, 16 Wend. 9; see also 2 Hill, 472, and 12 Johns. 474. "Its simple object," says Mr. Chitty (C. L. 875), "is to reduce a natural to a legal certainty; it signifies no more than *id est* or *scilicet*, that such a person means a particular person, or such a thing a particular thing, and must have precedent matter to which it refers." 4 Co. 17, b. Everything, therefore, as we have already seen, intended to be thus alluded to, must be stated previous to the *innuendo* which is to apply it to the matter charged as libellous. But whenever the *innuendo* is erroneous in consequence of its going beyond its office, if the libel be clear to a common intent without it, the defective part may be rejected as surplusage (6 East, 95; 8 East, 427; Cro. Car. 512; Cowp. 275; 5 East, 463); but care should be taken not to insert more innuendoes than are absolutely necessary, for the practice of overloading the record with innuendoes, to explain facts which need no explanation, is censurable; and Lord Ellenborough said, "that such practice seemed to proceed on the supposition that the court had no discernment and the jury no understanding, and an innuendo may sometimes be injuriously narrowing and limiting the prosecutor's case in proof." 3 Campb. 461; 7 Price, 544. As to innuendoes, see further Wh. Cr. Pl. & Pr. § 181, a; *supra*.

In an action on the case against a man for saying of another "he has burnt my barn," the plaintiff cannot, by way of innuendo, say, "meaning my barn full of corn" (Barham's case, 4 Co. 20, a); because this is not an explanation

him into public scandal, hatred, infamy, and disgrace (*or*, into public scandal, contempt, ridicule, and disgrace, etc., *according*

derived from anything which preceded it on the record, but from the statement of an extrinsic fact which had not previously been stated. But if, in the introductory part of the declaration, it had been averred that the defendant had a barn full of corn, and that in a discourse about the barn he had spoken the above words of the plaintiff, an innuendo of its being the barn full of corn would have been good; for by coupling the innuendo with the introductory averment, it would have made it complete. *R. v. Tutchin*, 5 St. Tr. 532; *Arch. C. P.* 494; *Alexander v. Angle*, 1 C. & J. 143; 1 Roll. Abr. 83, pl. 7, 85, pl. 7; 7 B. & C. 459; *Cro. Jac.* 126-39; *Clement v. Fisher*, 1 Man. & Ry. 281; 1 Sid. 52; 6 B. & C. 154; 2 Roll. Rep. 244; 2 Str. 934; *Goldstein v. Foss*, 9 D. & R. 197; 1 Saund. 242, note 3; *Wh. Cr. Pl. & Pr.* 181, *a*.

In *Spear v. State*, S. C. Rh. Is., March, 1881, the defendants were indicted for the publication of an alleged criminal libel upon one James O. Swan, as follows:—

Providence, se. At the court of common pleas of the state of Rhode Island and Providence Plantations, holden at Providence, within and for the county of Providence, on the first Monday of March, in the year of our Lord one thousand eight hundred and eighty-one. The grand jurors of the state of Rhode Island and Providence Plantations, and in and for the county of Providence, upon their oaths present: That Alonzo Spear, yeoman, and Frank E. Corbett, yeoman, both of or commorant of Providence, in said county, on the twenty-sixth day of December, in the year of our Lord one thousand eight hundred and eighty, with force and arms, at Providence aforesaid, in the aforesaid county of Providence, unlawfully and maliciously contriving and intending to vilify and defame one James O. Swan, who on the day aforesaid and long prior thereto was and had been a police constable in said Providence, in said county and state, and employed as a detective in said Providence, in said county and state, and who before said date last mentioned, went to South Kingstown, in the county of Washington, in said state, for the purpose of ascertaining who had possession of the freight, cargo and property which had come on shore from the steamer Rhode Island, which said steamer had been wrecked off the coast of said South Kingstown on the to wit, day of in the year of our Lord one thousand eight hundred and eighty, before said first mentioned date, and to injure him the said James O. Swan, both as an individual and as police constable and detective, with force and arms, at said city of Providence, in said county of Providence, in said state of Rhode Island, on the said twenty-sixth day of December, in the year of our Lord one thousand eight hundred and eighty, did unlawfully, wickedly, and maliciously compose and publish, and cause and procure to be composed and published in a certain newspaper called the "Sunday Morning Transcript," published and circulated in said Providence, in said county and state, by said Alonzo Spear and said Frank E. Corbett, said Alonzo Spear being the proprietor and said Frank E. Corbett the editor thereof, said newspaper on the day, month, and year first aforesaid having been published and circulated as aforesaid by said Alonzo Spear and said Frank E. Corbett, at said Providence, in said county and state, on said twenty-sixth day of December, in the year of our Lord one thousand eight hundred and eighty, a certain false, scandalous, wicked, malicious, mischievous, and defamatory libel of and concerning him the said James O. Swan, containing the false, scandalous, wicked, malicious, mischievous and defamatory and libellous words and matters, according to the tenor following, that is to say:—

"Detective Swan (*meaning the said James O. Swan*) holds at present some one and a half tons of rubber picked up at the wreck of the steamer Rhode Island (*meaning the wreck of the steamer Rhode Island wrecked as aforesaid on the coast of said South Kingstown*). Boston parties shipped quantities of rubber on the steamer, and of the same kind that Swan (*meaning the said James O. Swan*) now holds, but of course the marks of identification have been effaced,

to the nature of the libel), on, etc., at, etc. (giving place and date), of his great hatred, malice, and ill-will towards the said A. B.,

and they cannot prove their property, and so Swan (meaning the said James O. Swan) holds it and will undoubtedly eventually sell it (meaning that said James O. Swan has taken possession of and holds rubber from those lawfully entitled to the possession thereof, with the intention of selling the same instead of delivering the same into the possession of those lawfully entitled thereto). The question is, what did Detective Swan (meaning said James O. Swan) leave this city for (meaning said city of Providence) and go to the scene of the wreck? (meaning the place where the said steamer Rhode Island was wrecked). Did he (meaning said James O. Swan) go to protect the property from thieves and assist in its saving, or did he (meaning said James O. Swan) go for the purpose of scooping in what he (meaning said James O. Swan) could lay his (meaning said James O. Swan's) hands upon? (meaning in connection with the foregoing to charge by interrogation and insinuation that said James O. Swan, instead of going to said place for a proper purpose, went there for the purpose of unlawfully and improperly taking possession of, and appropriating to his own use and benefit, property from said wreck). It don't seem probable that citizen tax-payers would sanction the idea of paying a man \$3.50 per day to go on a wrecking cruise, and keep all the spoils he could get (meaning that said James O. Swan being employed by the city of Providence, and going to the place of said wreck, abused the purpose for which he went by unlawfully and improperly keeping and appropriating to himself for his own use and benefit and profit, property which might come into his possession from said wreck). If all the policemen who were sent to the wreck of the Rhode Island (meaning said steamer Rhode Island) acted in the same way (meaning in the way charged as aforesaid in said publication as by the innuendoes aforesaid), a disgrace of greater magnitude would rest upon the force (meaning the police force of said city of Providence) than there is at present upon it" (meaning said force) (meaning that the conduct of said James O. Swan in connection with the wreck, and with property therefrom, has brought disgrace upon the police force of said city of Providence); to the great injury, scandal, and disgrace of the said James O. Swan, and against the form of the statute in such case made and provided, and against the peace and dignity of the state. Preferred by SAM'L P. COLT, Assistant Attorney-General.

After a verdict of guilty had been rendered in the court of common pleas, the defendants moved in arrest of judgment, and as reasons therefor alleged—

1st. That no indictable offence was set forth in the indictment.

2d. That proper averments and inducement were wanting in the indictment to render certain precisely what the libel is of which the defendants are accused.

The motion was overruled and the defendants excepted. The case then came up on the exceptions.

The opinion of the supreme court was given by Durfee, C. J., as follows:—"The motion in arrest raises the question whether the defendants are duly accused of a criminal libel on James O. Swan. We think the question must be answered affirmatively. The publication complained of as libellous is recited verbatim in the indictment, being prefaced by an inducement setting forth extrinsic facts and circumstances and accompanied by innuendoes which explain its meaning and application. It is true it imputes no indictable offence, but it is not necessary that it should to make it libellous. It is enough, if false and malicious, that it implies conduct which, if said Swan were guilty of it, would injure his reputation, or degrade him in society, or lower him in the confidence of the community, or bring him into public hatred and contempt. 2 Whart. Crim. Law, § 2536; State v. Jeandell, 5 Har. (Del.) 475; Tillson v. Robbins, 68 Me. 295; Cooper v. Greeley, 1 Denio, 347; Miller v. Butler, 6 Cush. 71; Commonwealth v. Wright, 1 Cush. 46; Villars v. Wonsley, 2 Wils. 403.

"The publication complained of was, in our opinion, well calculated to produce

wickedly, maliciously, and unlawfully did compose and write, and cause and procure to be composed and written, a certain

precisely these effects, and all the more calculated to produce them because of the official character of James O. Swan and of the avidity of the public for scandalous stories against men in office.

"The specific objections to the indictment are two: The first is that the publication is not susceptible of so defamatory a meaning as is attributed to it by the innuendoes. We think, on the contrary, that the innuendoes err rather by defect than excess of imputations. And the verdict, of course, shows that the jury were of the opinion that the publication was in fact intended to convey the meanings attributed to it. *Commonwealth v. Keenan*, 67 Penn St. 203; *Sanderson v. Caldwell*, 45 N. Y. 308.

"The second objection is that the publication is not libellous *per se*, and that, for that reason, the indictment is fatally defective in not alleging with certainty and particularity what the libel or defamation is which is contained in it, and against the charge of which the defendants had to defend themselves. It is not by any means clear to our minds that the publication is not libellous *per se*, but granting that it is not, we nevertheless consider the indictment sufficient. We think it not improbable that it would have been more perfect in point of form, if the colloquium or prefatory averments had set forth with more precision the defamatory imputations which the defendants are accused of making in the publication, but under our statutes (*Gen. Stat. R. I.*, chap. 236, § 4) no indictment 'shall be abated or quashed for any want of form, provided it contain such allegations of the offence that the accused shall be able to plead and make defence thereto, without prejudice to his rights and to avail himself of any judgment thereon in case of a second complaint against him for the same offence,' and in our opinion the indictment here comes fully up to these requirements.

"The indictment shows that previous to the publication complained of, James O. Swan was a police constable and detective in Providence, and that the steamer *Rhode Island* having been wrecked off the coast at South Kingstown, he went there to ascertain who had possession of the freight, cargo, and property which had been washed ashore, though it does not state whether he went in his individual or official capacity. The indictment, having so averred, goes on to allege that the defendants, maliciously contriving and intending to vilify and defame said Swan, both as an individual and a police constable and detective, published of and concerning him, etc., setting forth the alleged libel with innuendoes.

"The alleged libel contains several distinct statements, the first of which is the following: 'Detective Swan holds at present some one and a half tons of rubber, picked up at the wreck of the steamer *Rhode Island*. Boston parties shipped quantities of rubber on that steamer, and of the same kind that Swan now holds, but of course the marks of identification have been effaced and they cannot prove their property, and so Swan holds it, and will, undoubtedly, eventually sell it.' It is very plain here that the imputation is that Swan, having got possession of rubber from the wreck, belonging to some person or persons other than himself, and probably to said Boston shippers, nevertheless, taking advantage of the effacement of the identifying marks, and without seeking for the owners, was holding it with the intention of eventually selling it and appropriating the proceeds of the sale to himself. The innuendoes actually inserted, however, fail to bring out the imputation so explicitly as we have stated it. The main innuendo is this: 'Meaning that said James O. Swan has taken possession of and holds rubber from those lawfully entitled to the possession thereof, with the intention of selling the same, instead of delivering the same into the possession of those entitled thereto.' If the indictment rested solely on the first statement, as thus explained, the objection to it would have some plausibility, for the reason that the innuendo does not bring clearly out what we think was ordinarily meant to be understood, namely, that Swan, taking advantage of the effacement of the marks,

false, scandalous, malicious, and defamatory libel, of and concerning the said A. B., containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B., that is to say (*set out a copy, with proper innuendoes to explain the meaning, if they be necessary*), which said scandalous, malicious, and defamatory libel, he the said C. D., afterwards, to wit, on, etc., at, etc., wickedly, maliciously, and unlawfully did send, (g) and cause to be sent, to one E. F., in the

and not seeking for the owners whom he could readily find, intended to sell the rubber and appropriate the proceeds; but whether even then the objection would be tenable we need not decide, for other statements follow, of which the libellous meanings are brought out with unexceptionable precision.

"The second statement is as follows: 'The question is, What did Detective Swan leave this city for and go to the scene of the wreck? Did he go to protect the property from thieves and assist in the saving, or did he go for the purpose of scooping in what he could lay his hands upon?' The principal innuendo is, 'Meaning, in connection with the foregoing, to charge by interrogation and insinuation, that said James O. Swan, instead of going to said place for a proper purpose, went there for the purpose of *unlawfully* and *improperly* taking possession of, and appropriating to his own use and benefit, property from said wreck,' or, to use other language, that he went there for the purpose of committing, if not absolute larceny, something which in morality is not easily distinguishable from it. Here certainly it cannot be doubted what the imputation is which the defendants are accused of making, nor that it is libellous.

"The third statement and innuendo are these: 'It don't seem probable that citizen taxpayers would sanction the idea of paying a man \$3.50 per day to go on a wrecking cruise and keep all the spoils he could get.' (Meaning that said James O. Swan, being employed by the city of Providence and going to the place of said wreck, abused the purpose for which he went, by unlawfully and improperly keeping and appropriating to himself for his own use and benefit and profit, property which might come into his possession from said wreck.) Here likewise, it seems to us, the meaning is so pointedly brought out as to leave no doubt either what the precise imputation is, or that it is libellous.

"The last statement is, as explained by the innuendo, to the effect that Swan's conduct in respect of the wreck and the property therefrom, was such that it has brought disgrace upon the police of the city of Providence. The statement is, in our opinion, so damaging to the reputation of Swan, as one of the Providence police, that it is libellous, and in this connection, so far as we can discover, the libel is sufficiently charged.

"The defendants refer to *State v. Corbett*, 12 R. I. 288, as a precedent in their favor. In that case there was neither inducement nor innuendoes, and without them the publication complained of, though it might have been understood in a sense which would be defamatory of the person alleged to be libelled, might likewise have been understood in a sense which would be entirely innocuous in respect of him. The publication here, as elucidated, explained, and charged in the indictment, is not open to any such objection.

"The exception is overruled, and the cause remanded for sentence."

(g) 2 Stark. on Slander, 369.

Where a libel merely reflects on a person in his profession, trade, or business; and the publication is confined to that person, it is not sufficient to aver an intention to disparage and injure the party in his profession, trade, or business; the indictment ought to allege an intent to provoke and excite the prosecutor to a breach of the peace. *R. v. Wegener*, 1 Stark. N. C. 245; 2 Stark. on Slander, 324; Wh. Cr. L. 8th ed. §§ 1618-9.

form of a letter, directed to the said E. F., and did thereby then and there unlawfully, wickedly, and maliciously publish, and cause to be published, the said libel, to the great damage, disgrace, scandal, and infamy of the said A. B., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said C. D., being such envious, evil, wicked, and malicious person, and wickedly, maliciously, and unlawfully minding, contriving, and intending as aforesaid, afterwards, to wit, on the same day and year aforesaid, at, etc. (*giving place*), of his great hatred, malice, and ill-will towards the said A. B., wickedly, maliciously, and unlawfully did write (*or print*) and publish, and cause and procure to be written (*or printed*) and published, a certain other false, scandalous, malicious, and defamatory libel of and concerning the said A. B., containing the false, scandalous, malicious, and defamatory words and matter following, of and concerning the said A. B., that is to say (*set out the libel, and conclude as before*).

(941) *Libel charging "scuttling ship," etc.*

That P. C., on, etc., at, etc., unlawfully and maliciously contriving and intending to vilify and defame J. E., E. A., and P. S., and to bring them into public scandal and disgrace, etc., unlawfully and maliciously did compose, print, and publish, and cause and procure to be composed, printed, and published in a newspaper printed and published at B., etc., called the "Daily Independent," a certain false, scandalous, malicious, and defamatory libel of and concerning the said E., A., and S., and of and concerning each of them, containing therein among other things the false, malicious, defamatory, and libellous words and matters following, that is to say: "Now, my worthies, E. . . ., A. . . ., and S. . . ., a beautiful trio you are,—three as mild-a-mannered and smooth-tongued scoundrels as ever scuttled ship or cut a throat;" against, etc. (*h*) (*Conclude as in book 1, chapter 3.*)

(*h*) Sustained in *Crowe v. People*, 92 Ill. 231.

(942) *Posting a man as a scoundrel, etc.(i)*

That W. C., late of, etc., being a person of an envious and wicked mind, and of a malicious disposition, and unlawfully contriving and intending, as much as in him lay, to injure, oppress, aggrieve, and vilify the good name, credit, and reputation of one C. H., etc., and to bring him into great contempt, hatred, infamy, and disgrace, on, etc., with force and arms, at, etc., a certain false, scandalous, and libellous writing against the said C. H., falsely, maliciously, and scandalously did frame and make, and then and there cause to be written, published, and posted up (the purport, substance, and effect of), which said writing is as follows, to wit, "C. H. (meaning the aforesaid C. H.) is a *liar*, a *scoundrel*, a *cheat*, and a *swindler*—don't pul this down, Nov. 7, 1807;" and that the said W. C., with intention to scandalize the said C. H., and to bring him into contempt, infamy, and disgrace, the aforesaid false, scandalous, malicious, and libellous writing so as aforesaid written, framed, and made, afterwards, to wit, on, etc., aforesaid, at Boston aforesaid, and in one of the public streets of said town, falsely, maliciously, and scandalously did publish and post up, and cause to be published and posted up, to the great scandal, infamy, and damage of the said C. H., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(943) *Libel upon an attorney, contained in a letter.(j)*

That on, etc., at, etc., one A. B. was one of the attorneys of the supreme judicial court of this commonwealth, and had been and was, before the composing, writing, and publishing of the several false, malicious, and defamatory libels hereinafter mentioned, retained and employed by one C. D., in the business and employment of his the said A. B.'s profession of an attorney at law, to write a letter to one E. F., demanding payment of a certain sum of money, to wit, the sum of fifty dollars then due and owing from the said E. F. to the said C. D., and that the said E. F., of, etc., unlawfully and maliciously contriving and intending to injure, scandalize, vilify, and defame the said A.

(i) *Com. v. Clap*, 4 Mass. 163. The first clause in brackets should be omitted. See for other form, 1045.

(j) *Davis's Prec.* 156; 3 Chit. C. L. 894.

B., and to bring him into public scandal and disgrace, and to injure, prejudice, and ruin him in his said business and profession of an attorney at law, on, etc., at, etc., aforesaid, unlawfully and maliciously did compose and write a certain false, scandalous, malicious, and defamatory libel of and concerning the said A. B. in his said business and profession, and of and concerning the demand aforesaid, so as aforesaid made by the said A. B. on the said E. F. as aforesaid, containing therein, among other things, the false, malicious, defamatory, and libellous words and matter following, of and concerning the said A. B., that is to say (*here insert the libellous matter, with proper innuendoes*), which said false, malicious, and defamatory libel he the said E. F., afterwards, to wit, on, etc., at, etc., unlawfully and maliciously did send, and cause to be sent to the said C. D., in the form of a letter addressed to the said C. D., and thereby then and there unlawfully and maliciously did publish, and cause to be published, the aforesaid libel, against, etc. (*Conclude as in book 1, chapter 3.*)

(944) *Publishing an ex parte statement of an examination before a magistrate for an offence with which the defendant was charged.*(k)

That before the printing and publishing of the defamatory and malicious libel herein afterwards mentioned, to wit, on, etc., one A. B. preferred to and before C. D., Esq., then and still one of the justices of the peace within and for the county of duly and legally authorized, appointed, and qualified to discharge and perform the duties of said office, a certain complaint and charge, in due form of law, against one E. F., for that he the said E. F., on, etc., at, etc., with force and arms, in and upon the body of her the said A. B. did make an assault, with intent her the said A. B. to ravish and carnally know, by force and against her will, against the peace, etc., and the form of the statute, etc. And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., of, etc., printer, well knowing the premises, but devising and intending to traduce and defame the said E. F., and to injure and prejudice him in the minds of the good people of said

(k) Davis's Prec. 158 ; 3 Chit. C. L. 911 ; 2 Campb. Rep. 563.

commonwealth, and to cause it to be believed that he was guilty of the said felonious assault, and thereby to prevent the due administration of justice, and to deprive the said E. F. of the benefit of an impartial trial for and concerning the matter of the said charge, on, etc., at, etc., did wilfully and maliciously print and publish, and did cause and procure to be printed and published, a certain scandalous, malicious, and defamatory libel, of and concerning the said charge and the matter thereof, and of and concerning the said E. F. ; in which said scandalous and malicious libel was and is contained, amongst other things, the false, scandalous, defamatory, and libellous words and matter following, of the said E. F., to wit (*here insert the publication correctly and with proper innuendoes*), to the great damage, etc., of him the said E. F., and against, etc. (*Conclude as in book 1, chapter 3.*)

(945) *Information for writing and publishing a libel against the king and government.*(l)

That J. H., late, etc., being a wicked, malicious, seditious, and ill-disposed person, and being greatly disaffected to our said lord the king, and to his administration of the government of this kingdom and the dominions thereunto belonging, and wickedly, maliciously, and seditiously contriving, devising, and intending to stir up and excite discontent and sedition among his majesty's subjects, and to alienate and withdraw the affection, fidelity, and allegiance of his majesty's subjects from his said majesty, and to insinuate and cause it to be believed that divers of his said majesty's innocent and deserving subjects had been inhumanly murdered by his said majesty's troops in the province, colony, or plantation of the Massachusetts Bay in New England, in America, belonging to the crown of Great Britain, and unlawfully and wickedly to seduce and encourage his majesty's subjects in the said province, colony, or plantation, to resist and oppose his said majesty's government, on, etc., with(n) force and arms, at,(n) etc.,

(l) 2 Stark. on Slander, 358.

(m) This allegation is unnecessary. See 7 T. R. 4; 2 Stark. on Slander, 359.

(n) As to the venue, see 2 Stark. on Slander, 302; Ib. 359.

wickedly, maliciously,^(o) and seditiously did write and publish,^(p) and cause and procure to be written and published, a certain false,^(q) wicked, malicious, scandalous, and seditious libel,^(r) of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect^(s) following:—

“King's Arms Tavern, Cornhill, June 7, 1775.

“At a special meeting this day of several members of the Constitutional Society, during an adjournment, a gentleman proposed that a subscription should be immediately entered into by such of the members present who might approve the purpose, for raising the sum of one hundred pounds, to be applied to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful to the character of Englishmen, preferring death to slavery, were for that reason only, inhumanly murdered by the king's (meaning his majesty's)^(t) troops at Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts Bay in New England, in America), on the nineteenth of last April; which sum being immediately collected, it was thereupon resolved, that Mr. H. (meaning himself the said J. H.) do pay to-morrow into the hands of Messrs. B. and C., on account of Dr. F., the said sum of one hundred pounds; and that Dr. F. be requested to apply the same to the above mentioned purposes: J. H.” (meaning himself the said J. H.), in contempt of our said lord the king, in open violation of the laws of this kingdom, and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said J. H., being such person as aforesaid, and again unlawfully, wickedly, maliciously, and seditiously devising, con-

(o) As to this averment, see 2 Stark. on Slander, 303; Ib. 359; Sty. 392; 1 Vin. Ab. 33.

(p) 1 Stark. on Slander, 358; Baldwin v. Elphinstone, Bla. R. 1037; 2 Stark. on Slander, 359.

(q) This allegation need not be proved. See 7 T. R. 4; 2 Stark. on Slander, 303; Ib. 359.

(r) See 1 Stark. on Slander, 358; 2 Stark. on Slander, 359.

(s) See 1 Stark. on Slander, 364; 2 Stark. on Slander, 359.

(t) As to the nature and use of the innuendo, see *supra*, notes to 940; 1 Stark. on Slander, 418; 2 Stark. on Slander, 359.

triving, and intending as aforesaid, afterwards, to wit, on, etc., with force and arms, at, etc., wickedly, maliciously, and seditiously printed and published, and caused and procured to be printed and published, in a certain newspaper entitled "The Morning and London Advertiser," a certain other false, wicked, scandalous, malicious, and seditious libel, of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following, that is to say (*setting out the libel, and conclude as before*).

(946) *Third and fourth counts. For publishing the same in other newspapers.*

Fifth count.

Wickedly, maliciously, and seditiously did print and publish, and cause and procure to be printed and published, a certain other false, wicked, malicious, scandalous, and seditious libel, of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following, that is to say (*as before*).

Sixth count. For printing and publishing the first part of the libel.

Seventh count.

That the said J. H., being, etc., and again unlawfully, wickedly, maliciously, and seditiously contriving, devising, and intending, as aforesaid, afterwards, to wit, on, etc., with force and arms, at, etc., wickedly, maliciously, and seditiously did write and publish, and cause and procure to be written and published, a certain false, wicked, scandalous, malicious, and seditious libel, of and concerning his said majesty's government and the employment of his troops, according to the tenor and effect following: "I (meaning himself the said J. H.) think it proper to give the unknown contributor this notice, that I (again meaning himself the said J. H.) did yesterday pay to Messrs. B. and C., on the account of Dr. F., the sum of fifty pounds, and that I (again meaning himself the said J. H.) will write to Dr. F., requesting him to apply the same to the relief of the widows, orphans, and aged parents of our beloved American fellow-subjects, who, faithful

to the character of Englishmen, preferring death to slavery, were, for that reason only, inhumanly murdered by the king's (meaning his said majesty's) troops, at or near Lexington and Concord, in the province of Massachusetts (meaning the said province, colony, or plantation of the Massachusetts Bay, in New England in America), on the nineteenth of last April: J. H." (again meaning himself the said J. H.) (*Conclusion as before.*)(u)

For sedition generally, see post, 961, etc., 1127, etc.)

(947) *Libel on the president of the United States.*(v)

That T. C., late, etc., being a person of wicked and turbulent disposition, designing and intending to defame the president of the United States, and to bring him into contempt and disrepute, and to excite against him the hatred of the good people of the United States, on, etc., at, etc., and within the jurisdiction of this court, wickedly and maliciously did write, print, utter, and publish a false, scandalous, and malicious writing against the said president of the United States, of the tenor and effect following, that is to say: "Nor do I (himself the said T. C. meaning) see any impropriety in making this request of Mr. Adams (meaning John Adams, Esq., president of the United States) at the time; he (the said president of the United States meaning) had just entered into office; he (meaning the said president of the United States) was hardly in the infancy of political mistake; even those who doubted his capacity (meaning the capacity of the said president of the United States) thought well of his (meaning the said president of the United States) intentions." And also the false, scandalous, and malicious words of the tenor and effect following, that is to say: "Nor were we (meaning the people of the United States) yet saddled with the expense of a permanent navy, or threatened under his (meaning the said president of the United States) auspices with the existence of a standing

(u) The original (see Cowp. 683) contains other counts stating the printing and publishing of the latter libel in different newspapers, and also the publishing of both on different days. 2 Stark. on Slander, 361.

(v) This was the indictment in the celebrated case in which Dr. Thomas Cooper was convicted in 1809, and which afterwards became the cause of considerable political contention. It was prepared by Mr. Rawle, then district attorney of the United States, and stood the test of severe scrutiny. Since the repeal of the sedition law, the offence is no longer cognizable in the federal courts; but the precedent may be of use in indictments at common law in the states.

army. Our credit (meaning the credit of the United States) was never yet reduced so low as to borrow money at eight per cent. in time of peace, while the unnecessary violence of official expressions might justly have provoked a war."

And also the false, scandalous, and malicious words of the tenor and effect following, that is to say: "Mr. Adams (meaning the said president of the United States) had not yet projected his (the said president of the United States meaning) embassies to Prussia, Russia, and the Sublime Porte, nor had he (the said president of the United States meaning) yet interfered as president of the United States to influence the decisions of a court of justice—a stretch of authority which the monarch of Great Britain would have shrunk from—an interference without precedent, against law, and against mercy. This melancholy case of Jonathan Robbins, a native citizen of America, forcibly impressed by the British, and delivered up with the advice of Mr. Adams (meaning the said president of the United States) to the mock trial of a British court-martial, had not yet astonished the republican citizens of this free country (meaning the United States of America)—a case too little known, but of which the people (meaning the people of the said United States) ought to be fully apprised before the election, and they shall be;" to the great scandal of the president of the United States, to the evil example of others in the like case offending, against, etc. (*Conclude as in book 1, chapter 3.*)

(948) *Another form for same.(w)*

That H. C., late, etc., being a malicious and seditious man, of a depraved mind, and wicked and diabolical disposition, and also deceitfully, wickedly, and maliciously devising, contriving and intending T. J., Esq., president of the United States of America, to detract from, scandalize, traduce, vilify, and to represent him the said T. J. as unworthy the confidence, respect,

(w) *People v. Croswell*, 3 Johns. 337. In consequence of the equal division of the supreme court of New York on the great questions involved in this case, no judgment was entered on the indictment; but its value as a precedent is established by the fact that it was drawn by Mr. Ambrose Spencer, one of the most acute and accomplished pleaders of the day, and that no technical exception was taken to it by Mr. Hamilton. At the same time, I apprehend the passage in italics is surplusage, and that the "or" in the averment of the publication had better be changed to "and."

and attachment of the people of the United States, and to alienate and withdraw from the said T. J., Esq., president as aforesaid, the obedience, fidelity, and allegiance of the citizens of the state of New York, and also of the said United States; and wickedly and seditiously to disturb the peace and tranquillity, as well of the people of the state of New York as of the United States; and also to bring the said T. J., Esq. (as much as in him the said H. C. lay), into great hatred, contempt, and disgrace, not only with the people of the state of New York and the said people of the United States, but also with the citizens and subjects of other nations; *and for that purpose the said H. C. did, on, etc., at, etc., wickedly, maliciously, and seditiously print and publish, and cause and procure to be printed and published, a certain scandalous, malicious, and seditious libel, in a certain paper or (and) publication entitled "The Wasp;" containing therein, among other things, certain scandalous, malicious, inflammatory, and seditious matters, of and concerning the said T. J., Esq., then and yet being president of the United States of America, that is to say, in one part thereof, according to the tenor and effect following, that is to say: "He (the said T. J., Esq., meaning) paid C. (meaning one J. T. C.) for calling Washington (meaning G. W., Esq., deceased, late president of the said United States) a traitor, a robber, and a perjurer; for calling Adams (meaning J. A., Esq., late president of the said United States) a hoary-headed incendiary, and for most grossly slandering the private characters of men whom he (meaning the said T. J.) well knew to be virtuous;" to the great scandal and infamy of the said T. J., Esq., president of the said United States, in contempt of the people of the said state of New York, in open violation of the laws of the said state, to the evil example, etc., and against, etc. (Conclude as in book 1, chapter 3.)*

(949) *Libel on a judge and jury when in the execution of their duties.*(x)

That heretofore, to wit, at the sittings at nisi prius, holden on, etc., at, etc., before the right honorable Sir Frederick Pollock,

(x) Arch. C. P. 5th Am. ed. 695. See *R. v. White*, 1 Campb. 359; *R. v. Watson*, 2 T. R. 199. See Wh. Cr. L. 8th ed. § 1639.

chief baron of our said lady the queen, of her court of exchequer at Westminster aforesaid, a certain issue duly joined in the said court, between one A. B. and one C. D., in a certain action on promises in which the said A. B. was plaintiff and the said C. D. defendant, came on to be tried in due form of law, and was then and there tried by a certain jury of the country, in that behalf duly sworn and taken between the parties aforesaid.

And the jurors aforesaid, upon their oaths aforesaid, do further present, that J. S., late, etc., being a wicked and ill-disposed person, wickedly and maliciously contriving and intending to bring the administration of justice in this kingdom into contempt, and to scandalize and vilify the said Sir F. P. and the jurors by whom the said issue was so tried as aforesaid, and to cause it to be believed that (*here state the effect of the libel*), on, etc., with force and arms, at, etc., wickedly and maliciously did write and publish, and cause and procure to be written and published, a certain false, wicked, malicious, and scandalous libel, of and concerning the administration of justice in this kingdom, and of and concerning the trial of the said issue, and of and concerning the said Sir F. P. and the jurors by whom the said issue was so tried as aforesaid, according to the tenor and effect following, that is to say (*here set out the libel, together with such innuendoes as may be requisite*), to the great scandal and reproach of the administration of justice in this kingdom, in contempt of our lady the queen and her laws, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(950) *Libel on a sheriff, attributing to him improper motives and conduct, in getting up petitions, etc., for the locating of the seat of justice in a particular county.*(y)

That A. B., on, etc., at, etc., being a person of an envious and evil and wicked mind, and wickedly, maliciously, and unlawfully contriving and intending, as much as in him lay, to injure, oppress, and vilify the good name, fame, credit, and reputation of a certain T. W., a good citizen of this commonwealth, and sheriff of the county of Cabell, and to bring him into contempt,

infamy, and disgrace, and to represent him as a corrupt officer, etc., a certain scandalous and libellous writing maliciously and scandalously did write and publish, and then, etc., did cause to be written and published, in the form of a petition addressed to the honorable the speakers and members of the general assembly of this commonwealth, in which said libel are contained divers scandalous, scurrilous, and malicious matters, according to the tenor following: "That the said T. W., being desirous of having it (meaning the seat of justice for Cabell county) on his own plantation, where it was first held, has, and now is circulating a petition in this county, addressed to your honorable body for that purpose. Your petitioners beg leave to state, that the said T. W. is actuated only by selfish and interested motives, and is by no means governed by a desire for the promotion of the convenience and welfare of a majority of the people of this county; that the place he proposes is on his own land, and that it is not only rendered almost inaccessible by reason of the hills and mountains surrounding it, but it is not near the centre of population or territory, so that it is among the most inconvenient places that could possibly be thought of, and that the said T. W. uses base and dishonorable means to forward his views, for that he being high sheriff of this county, and of course has the collection of the public revenue and taxes, he persuades ignorant and illiterate men to sign his petition, frequently stating that for so doing he will indulge them for a time, and not be over-strenuous in his collections; that the people of this county are generally poor, and as there is very little money in circulation among them, an indulgence of this kind is to them a great favor; that the said T. W. does not present his petition at any public collection of the people, when the merits of it might be inquired into and discussed, but procures signers to it, as he rides through the county, in his office of sheriff, in secret and hidden places," to the great scandal and damage of the said T. W., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(951) *Libel on a justice of the police court in Boston, etc.*

That B. W., Esq., on, etc., at, etc., was one of the justices of the police court and justices' court for the county of Suffolk, and acting as senior justice of the police court, and that W. J.

S., laborer, on, etc., at, etc., being an evil disposed person, and unjustly and unlawfully devising, contriving, and intending, as much as in him the said W. J. S. lay, to defame, asperse, scandalize, and vilify the character of the said B. W., Esq., and to insinuate and cause it to be believed that the said B. W. had been guilty of gross misconduct in his said office of justice of the police court as aforesaid, did unlawfully and maliciously, wickedly and scandalously, compose, write, print, and publish, and did cause and procure to be composed, written, printed, and published, in a certain public newspaper, entitled the "New England Galaxy," a certain false, wicked, mischievous, and scandalous libel of and concerning said B. W., and of and concerning his official conduct in said office of justice of the police court, and of and concerning the administration of the public justice of said police court, whilst he said B. W. was presiding and sitting therein as one of the justices of said court, which said wicked, mischievous, and scandalous libel is to the tenor and effect following, that is to say: "After two days and nights' consideration, we now sit down in order to give Mr. W. an opportunity to see how he stands in the opinion of great and small. We accuse him of disgracing his office, of perverting the law, which, bad as it is, is yet worse in such hands; of doing injustice to his seat; of descending from his official dignity; of suffering his personal feeling to interfere with the discharge of his functions, etc. We do not pretend that we have related all of the above conversation with minute accuracy, or that we may not have forgotten some trivial circumstances; but that it is correct in substance we pledge our sacred honor, and would pledge our life if it could be pledged. Let Judge W. choke a week or so on this pill" (meaning said libel), "and we have one or two more as hard to swallow in reserve" (meaning that he, said S., had one or two more libels on said W. in reserve for future publication). "These, bitter as they are, are not the words of passion, but the deliberate expression of our conviction respecting the duty we owe to ourselves and our country. We think we shall do service to God and man by removing this unjust magistrate from the seat he disgraces" (meaning that said W., in the discharge of his official duty as one of the justices of said police court, was an unjust judge, and that he

disgraced such office by illegal and unjust conduct, that he ought to be impeached of crimes and misdemeanors, and ought to be removed and degraded from his office; and that so enormous and iniquitous were his acts, doings, conduct, and behavior in his said office, as one of the justices of the police court as aforesaid, that, in consequence of their enormity and iniquity, it would be doing service to God and man to have him, said W., removed from said office); to the great damage and infamy of the said W., to the great scandal and dishonor of public justice, to the evil example, etc., against, etc., and contrary, etc.(z) (*Conclude as in book 1, chapter 3.*)

(952) *Libel on an officer, said libel consisting of a paper alleged to have been read by the defendant at a public meeting, but which was in the defendant's possession, or destroyed, and consequently was not produced to the grand jury.*(a)

That A. B., late, etc., on, etc., at, etc., and within the jurisdiction of the said court, being a person of evil mind and disposition, and wickedly and maliciously devising and intending to bring contempt, discredit, and dishonor on the administration of public justice in the said city and county, to deprive C. D. (the said C. D. being, etc.) of his good name, fame, and reputation, as well as unjustly to subject him, the said C. D., to high pains and penalties, unlawfully, wickedly, and maliciously did publish and compose, and cause and procure to be composed and published, a certain false, scandalous, and malicious libel, of and concerning the said C. D., in his office as aforesaid; the words and tenor of which said libel are to this inquest unknown, by reason that the said A. B., having the said libel in his possession and custody, hath altogether refused, and still refuses to produce

(z) The distinctive part of this form is drawn from *Com. v. Snelling*, 15 Pick. 321. The only question raised on the indictment was on the propriety of the innuendoes. There was no express averment that the libel was of and concerning the removal of W. from office by impeachment. It was held that the first innuendo did not enlarge the meaning of the words of the libel; and that even if the second innuendo did so (which it was said it did not), it might be rejected as surplusage, the words of the libel being in themselves sufficient to sustain the indictment. Judgment was entered against the defendant.

(a) *Com. v. Stratford*, Sup. Ct. Penn. Dec. T. 1845, No. 39. This case was tried before Judge Burnside in 1846, at the supreme court, when the indictment was said by the court to be good, though no verdict was rendered, there having been a disclaimer and *nolle prosequi*.

the same, or to permit the same to be inspected by this inquest, although thereto often requested, to wit, by the attorney-general of this commonwealth, after the publication of the said libel, and at and before the sittings of this inquest, which said libel contained, among other things, words of the substance and effect following, that is to say (*here follows libellous matter*), to the great damage, injury, and disgrace of the said A. B., to the great discredit and dishonor of public justice as aforesaid, and against, etc. (*Conclude as in book 1, chapter 3.*)

(953) *Seditious libel.* *The libellous matter consisting of an address to the electors of Westminster, of which the defendant was the representative, charging the government with trampling upon the people.*(b)

That Sir F. B., late, etc., being a seditious, malicious, and ill-disposed person, and unlawfully and maliciously devising and intending to raise and excite discontent, disaffection, and sedition among the liege subjects of our lord the present king, and amongst the soldiers of our said lord the king, and to move and excite the liege subjects of our said lord the king to hatred and dislike of the government of this realm, and to insinuate and cause it to be believed by the liege subjects of our said lord the king, that divers of the liege subjects of our said lord the king had been inhumanly cut down, maimed, and killed by certain troops of our said lord the king, heretofore, to wit, on, etc., at, etc., unlawfully and maliciously did compose, write, and publish, and cause to be composed, written, and published, a certain scandalous, malicious, and seditious libel, of and concerning the government of this realm, and of and concerning the said troops of our said lord the king, according to the tenor and effect following (that is to say): "To the electors of Westminster: Gentlemen, on reading the newspapers this morning, having arrived late yesterday evening, I was filled with shame, grief, and indignation, at the account of the blood spilled at Manchester: This then is the answer of the borough-mongers to the petitioning

(b) *R. v. Burdett*, 4 B. & Alt. 95. This was the indictment on which Sir Francis Burdett, after a struggle of great historical interest, was convicted and sentenced to three months' imprisonment, and a fine of £2000. See Wh. Cr. L. 8th ed. §§ 1612, 1618, 1620, 1643, 1655.

people; this the practical proof of our standing in no need of reform; these the practical blessings of our glorious borough-mongers' domination; this the use of a standing army in time of peace. It seems our fathers were not such fools as some would make us believe in opposing the establishment of a standing army, and sending King William's Dutch guards out of the country. Yet would to Heaven they had been Dutchmen, Switzers, or Hessians, or Hanoverians, or anything rather than Englishmen, who did such deeds. What! kill men unarmed, unresisting! and, gracious God, women too, disfigured, maimed, cut down, and trampled on by dragoons! (meaning the said troops of our said lord the king, and meaning thereby that divers liege subjects of our said lord the king had been inhumanly cut down, maimed, and killed by the said troops of our said lord the king). Is this England? This a Christian land? a land of freedom? Can such things be, and pass by us like a summer cloud, unheeded? Forbid it every drop of English blood in every vein that does not proclaim its owner bastard. Will the gentlemen of England support or wink at such proceedings? They have a great stake in their country. They hold great estates, and they are bound, in duty and in honor, to consider them as retaining fees on the part of their country, for upholding its rights and liberties; surely they will at length awake and find they have other duties to perform besides following bullocks and planting cabbages. They never can stand tamely as lookers-on, whilst bloody Neros rip open their mothers' womb. They must join the general voice, loudly demanding justice and redress, and head public meetings throughout the united kingdom, to put a stop in its commencement to a reign of terror and of blood; to afford consolation as far as it can be afforded, and legal redress to widows and orphans and mutilated victims of this unparalleled and barbarous outrage. For this purpose I propose that a meeting should be called in Westminster, which the gentlemen of the committee will arrange, and whose summons I will hold myself in readiness to attend. Whether the penalty of our meeting will be death by military execution, I know not; but this I know, a man can die but once, and never better than in vindicating the laws and liberties of his country. Excuse this hasty address; I can scarcely tell

what I have written. It may be a libel, or the attorney-general may call it so, just as he pleases. When the seven bishops were tried for libel, the army of James the Second, then encamped on Hounslow Heath, for supporting military power, gave three cheers on hearing of their acquittal. The king, startled at the noise, asked, 'What's that?' 'Nothing, sire,' was the answer, 'but the soldiers shouting at the acquittal of the seven bishops.' 'Do you call that nothing?' replied the misgiving tyrant, and shortly after abdicated the government. 'Tis true James could not inflict tortures on his soldiers—could not tear the living flesh from their bones with a cat-o'-nine-tails—could not flay them alive. Be this as it may, our duty is to meet, and 'England expects every man to do his duty.' I remain, gentlemen, most truly and faithfully, your most obedient servant, F. B." In contempt of our said lord the king and his laws, to the evil example of all others, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(954) *Publishing at a time of popular commotion resolutions attacking the government as bloodthirsty, etc.(c)*

That on, etc., at, etc., ten thousand persons unknown, with force and arms, unlawfully did assemble armed with divers offensive weapons, to wit, sticks, clubs, and daggers, bearing banners and flags, and were then and there making a great noise and disturbance, to the great terror and alarm of the peaceable subjects of our lady the queen, and that G. M. and J. H. S., together with certain other persons, forming and being a part of the London metropolitan police force, having theretofore been sworn in and then being special constables of the borough of Birmingham, in pursuance of the statute in such case made and provided, did by the order and direction of W. S., Esq., and J. R. B., Esq., justices of our said lady the queen, assigned to keep the peace, disperse, separate, and remove, and cause and procure to be dispersed, separated, and removed, the said unlawful assembly of persons, and that they the said G. M. and J. H. S. were, together with the said other persons forming part of the metropolitan police force, then and there acting in the due execu-

(c) *R. v. Collins*, 2 C. & P. 456. There was a verdict of guilty on this count, before Littledale, J., in 1839. See Wh. Cr. L. 8th ed. §§ 1611, 1640.

tion of their duty as such special constables, in dispersing and causing to be dispersed the said unlawful assembly of persons; and that the defendant, intending to excite divers liege subjects of the queen to resist the laws and to resist the persons so being part of the metropolitan police force in the due execution of their duty, and to bring the said force into hatred and contempt, and to procure unlawful meetings, and to cause divers liege subjects of the queen to believe that the laws of this kingdom were unduly administered, and intending to disturb the public peace, and to raise discontent in the minds of the subjects of the queen, and to raise and excite tumult and disobedience to the laws, did publish a certain false, etc., libel, of and concerning the said persons so being part of the London metropolitan police, and of and concerning the administration of law and justice within this realm, containing the false and malicious, scandalous, seditious, and libellous matter following, that is to say:—

“Resolutions unanimously agreed to by the general convention:—

“Resolved, 1st. That this convention is of opinion that a wanton, flagrant, and unjust outrage has been made upon the people of Birmingham by a bloodthirsty and unconstitutional force from London, acting under the authority of men who, when out of office, sanctioned and took part in the meetings of the people, and now, when they share in the public plunder, seek to keep the people in social slavery and political degradation.

“2d. That the people of Birmingham are the best judges of their own right to meet in bull-ring or elsewhere, have their own feelings to consult respecting the outrage given, and are the best judges of their own power and resources to obtain justice.

“3d. That the summary and despotic arrest of Dr. T., our respected colleague, affords another convincing proof of the absence of all justice in England, and clearly shows that there is no security for life, liberty, or property, till the people have some control over the laws they are called upon to obey.

“By order,

W. L., Sec.”

To the great scandal, etc., against, etc. (*Conclude as in book 1, chapter 3*)

(955) *Libel in German, in the circuit court of the United States.*(d)

That B. M. and C. F., late of, etc., being ill-disposed persons, designing and intending to vilify and defame the government of the United States, and the administration of justice therein, and to cause it to be believed that the judiciary courts of the said United States were actuated by unlawful motives and not by the duty imposed on them by the constitution of the United States aforesaid, and thereby to weaken and diminish the authority of the said courts and excite opposition against the same, on, etc., at, etc., wickedly and maliciously did print and publish, and cause to be printed and published, in a certain newspaper then and there printed in the German language, and called "Unpartheiische Harrisburg Zeitung," which German words signify, "The Impartial Harrisburg Newspaper," the false, scandalous, contemptuous, and malicious words, matters, and things, following, that is to say, "Capt. John Fries. Die constitution der Vereinigten Staaten sagt Hochverrath soll nur darein bestehen wenn man Krieg gegen derselben erkläret oder ihren Feinden anhanget und sie unterstützt," which German words signify "The Constitution of the United States says high treason shall consist only in levying war against the same, or in aiding or abetting their enemies." "Dieses würde den 30sten April, 1790, durch ein Acte des Congresses erkläret dass wann eine Person die zu den Vereinigten Staaten von America gehöret Krieg gegen dieselben erkläret, oder ihren Feinden anhanget und unterstützt sie," etc. (*Here translate the last written sentence, proceed with the remainder of the libellous matter, translating the same sentence by sentence with proper innuendoes, and conclude*): in contempt of the said United States and the judicial courts thereof, to the great scandal and infamy of the

(d) U. S. v. Meyer, circuit court United States for Pennsylvania, October, 1799, No. 6.

A curious feature in this case is, that though the indictment does not even pretend to be for a statutory offence, the defendants "submitted themselves to the judgment of the court, protesting their innocence." So far therefore from its being an understood thing in the courts of the period that there are no common law offences against the United States, we find that a series of defendants, ably defended, in the midst of a struggle of great violence and ardor, do not even think it worth while to test the validity of an offence to which even the "*contra formam*" is not attached. See Wh. Cr. L. 8th ed. § 253.

judges and jurors of the circuit court of the said United States in and for the Pennsylvania district, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(956) *Libel in French against a foreign potentate.(c)*

That before and at the times of the printing and publication of the scandalous, malicious, and defamatory libels and libellous matters and things aftermentioned, there subsisted, and now subsists, friendship and peace between our sovereign lord the king and the French republic, and the subjects of our said lord the king and the citizens of the said republic; and that before and at those times, citizen N. B. was and yet is first consul of the said French republic, to wit, at, etc., and that J. P., late of, etc., well knowing the premises aforesaid, but being a malicious and ill-disposed person, and unlawfully and maliciously devising and intending to traduce, defame, and vilify the said N. B., and to bring him into great hatred and contempt, as well among the liege subjects of our said lord the king as among the citizens of the said republic, and to excite and provoke the citizens of the said republic by force of arms to deprive the said N. B. of his consular office and magistracy in the said republic, and to kill and destroy the said N. B., and also unlawfully and maliciously devising, as much as in him the said J. P. lay, to interrupt, disturb, and destroy the friendship and peace subsisting between our said lord the king and his subjects and the said N. B., the French republic, and the citizens of the same republic, and to excite animosity, jealousy, and hatred in the said N. B. against our said lord the king and his subjects, on the sixteenth day of August, in the forty-second year of the reign of our sovereign lord George the Third, by the grace of God of the United Kingdom of Great Britain and Ireland king, defender of the faith, at the parish of St. Anne, within the liberty of Westminster, in the county of Middlesex, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a most scandalous and malicious libel, in the French language, of and concerning the said N. B., that is to say, one part thereof to the tenor following, that is to say:—

(c) 2 Stark. on Slander, 354. This was the form used in Peltier's case.

“Le 18 Brumaire. An. viii. Ode attribuée a Chenier.

“Quelles tempêtes effroyables

Grondent sur les flots déchainés,” etc.

And in another part thereof to the tenor following, that is to say:—

“Deja dans sa rage insolente;” etc.

Which said scandalous and malicious words, in the French language first above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, “What frightful tempests growl on the unchained waves,” etc. And which said scandalous and malicious words secondly above mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as the English words following, that is to say, “Already,” etc. (*Conclude as above.*)

Second count.

That the said J. P., so being such person as aforesaid, and unlawfully and maliciously devising and intending as aforesaid, to wit, on the twenty-sixth of August, in the forty-second year of the reign aforesaid, at the parish of St. Anne, in the liberty of Westminster, in the county of Middlesex, unlawfully and maliciously did print and publish, and cause and procure to be printed and published, a certain other scandalous and malicious libel, containing therein, among other things, divers other scandalous and malicious matters, in the French language, of and concerning the said N. B., in the form of an address to the French people, according to the tenor following, that is to say, “Citoyens,” etc. Which said scandalous and malicious words, in the French language last before mentioned and set forth, being translated into the English language, were and are of the same signification and meaning as these English words following, that is to say, “Citizens,” etc., to the great scandal, disgrace, and danger of the said N. B., to the great danger of creating discord between our said lord the king and his subjects, and the said N. B., the French republic, and the citizens of the said republic, in contempt, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(957) *Sending a letter to a commissioner of revenue in the United States, containing corrupt proposals.*(f)

That whereas, on the thirteenth day of May, one thousand seven hundred and ninety-four, it was enacted by the senate and house of representatives of the United States of America, in congress assembled (*here set forth the act of congress, providing that a beacon and light-house should be constructed as soon as the jurisdiction of sufficient ground should be ceded to the United States by the state of North Carolina*); and whereas, the legislature of the state of North Carolina did, on the seventeenth day of July, one thousand seven hundred and ninety-four, cede to the United States the jurisdiction of so much of the head-land of cape Hatteras, in the same state, as the president of the said United States deemed sufficient and most proper for the convenience and accommodation of a light-house, and also a sufficient quantity of land for building on the said island, in the harbor of Occacoek, called Shell Castle, a beacon of the kind, descriptions, and dimensions aforesaid; and whereas, afterwards, to wit, on, etc., at, etc., C. D., Esq. (he the said C. D. then and there being commissioner of the revenue, in the department of the secretary of the treasury), then and there was appointed and instructed by the secretary of the treasury, by and with the authority of the president of the said United States, to receive proposals for building the light-house aforesaid, and beacon aforesaid, A. B., late, etc., being an ill-disposed person, and wickedly contriving and intending to bribe and seduce the said C. D., so being commissioner of the revenue, from the performance of the trust and duty so in him reposed, on, etc., at, etc., and within the jurisdiction of this court, wickedly, advisedly, and corruptly did compose, write, utter, and publish, and cause to be delivered to the said C. D., a letter, addressed to him the said C. D., in the words and figures following, that is to say (*here set forth the letter, and conclude*): to the evil example, etc., and against, etc. (*as in book 1, chapter 3*).

(f) U. S. v. Worrall, 2 Dall. 384. Wh. St. Tr. 139. Whatever may be said as to the jurisdiction of the federal courts over common law offences, which was assumed in this case, there can be no doubt that as a matter of pleading this indictment is good. Wh. Cr. L. 8th ed. § 1858.

(958) *Writing a seditious letter, with intent to excite fresh disturbances in a district in a state of insurrection.*(g)

That whereas, on, etc., in the counties of W. and A., in the district of Pennsylvania, certain wicked, seditious, and ill-disposed persons disaffected to the constitution and laws of the said United States, and unlawfully and seditiously contriving and intending, as much as in them lay, to resist the government and defeat the laws of the same United States, did unlawfully and seditiously assemble and gather themselves together, armed and arrayed in a warlike manner, to oppose the execution of the laws of the said United States; and whereas J. W., Esq., on the day and year aforesaid, he being an associate judge of the supreme court of the said United States, did certify to the president of the said United States, that in the said counties of W. and A. laws of the United States are opposed and the execution thereof obstructed by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers vested in the marshal of the district; and whereas the president of the United States is required by the constitution thereof to take care that the laws thereof be faithfully executed; and whereas the president of the United States, in pursuance of the powers and duties in him vested, did, on, etc., call forth the militia of the state of P., to suppress such combinations and to cause the laws to be duly executed, and at the same time the president of the said United States did authorize and empower certain persons to act as commissioners, with the hope of recalling the said turbulent and seditious persons to a sense of their duty and obedience to the laws of the said United States, which persons so authorized did proceed to P. in the execution of the said powers and authority; and whereas, in the county of W., in the district aforesaid, certain turbulent, ill-disposed, and seditious persons did unite, combine, and confederate with the said turbulent, wicked, and seditious persons in the counties of W. and A., and did agree to assemble together at P.'s ferry on the M., on, etc., with design further to oppose and resist the execution of the laws of the said United States; and the grand inquest

(g) U. S. v. Lusk, Circuit Court, Phil. 1794. This indictment was drawn by Mr. Rawle, United States district attorney in 1794, but was never tried.

aforesaid, upon their respective oaths and affirmations aforesaid, further do present, that R. L., late of, etc., yeoman. being an ill-disposed person, did, on, etc., in the year aforesaid, in the district aforesaid, wickedly, maliciously, and seditiously write and publish and send to be delivered a certain malicious and seditious letter(h) directed to a certain Mr. William Morehead, near G., the tenor of which said writing and letter is as followeth:—

“Mr. W. M., near G.

August ye 26th, 1794.

“Honored Sr: as you have begun a good work in that country (meaning thereby the said seditious opposition to the laws of the United States), we (himself, the said R. L., and other persons in the said county of C. meaning) wish to have a hand in the fre (meaning that the said R. and other persons wished to unite with and support the said seditious opposition to the laws). as soon as I seed your appointment of meeting on ye 14th instant past (meaning the said meeting at P.), I advertised all round about us to meet on 2d day, and so we had a great meeting and our resolves is in the C. News Papers,” etc. (*proceeding with letter*); he, the said R. L., wickedly, maliciously, and seditiously intending, by writing and publishing and sending to be delivered the said letter, to excite, encourage, and promote as well the said William Morehead as other persons in the said counties of W., A., and W., to oppose the laws and resist the government of the said United States, to the evil example, etc., in contempt, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(959) *Hanging a man in effigy.*(i)

That A. B., in the county aforesaid, unlawfully, wickedly, and maliciously intending to injure J. N., etc., unlawfully, wickedly, and maliciously did make, and cause and procure to be made, a certain gibbet and gallows, and also a certain effigy and figure, intending to represent the said J. N., and then and there unlawfully, wickedly, and maliciously did erect, set up, and fix, and cause and procure to be erected, set up, and fixed, the said gibbet and gallows in a certain yard and place near unto a certain common highway there situate, called and near to a certain

(h) See as to setting out the letter sent, *Resp. v. Carlisle*, 1 Dall. 35.

(i) Arch. C. P. 5th Am. ed. 739.

ferry called the Horse Ferry, where the said J. N. was used and accustomed to ply in the way of his trade and business of a waterman; and then and there unlawfully, wickedly, and maliciously did hang up and suspend, and cause and procure to be hung up and suspended, the said effigy and figure, to and upon the said gibbet and gallows, with the name of the said J. N. inscribed on a piece of wood and affixed to the said effigy and figure, together with divers scandalous inscriptions and devices upon and about the same, reflecting on the character of the said J.; and did then and there keep and continue, and cause and procure to be kept and continued, the said gibbet and gallows so erected and set up as aforesaid, with the said effigy and figure hung up and suspended to and from the same as aforesaid, together with the several inscriptions and devices aforesaid, so affixed as aforesaid, for a long space of time, to wit, for the space of four days then next following, and during all that time unlawfully, wickedly, and maliciously did then and there publish and expose the said gibbet and gallows, with the said effigy and figure thereon, to the sight and view of divers good and worthy subjects of our said lady the queen, passing and repassing in and along the highway aforesaid; to the great scandal, infamy, and disgrace of the said J. N., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(960) *Insulting a justice in the execution of his office.*(j)

That heretofore, to wit, on, etc., a special session of the peace was holden at, etc., before certain justices of the peace of our sovereign lady the queen for the said county of to wit, before P. Q., R. S., and X. Y., and others their fellows, being justices as aforesaid of the county of aforesaid, who had then and there assembled and met together, with purpose and intent to authorize and empower certain persons then and there also assembled and attending, to keep respectively in their respective parishes within the said county of certain common inns and alehouses, as by the laws of this realm the said justices as aforesaid were authorized and empowered to do, at which said session so then and there holden as aforesaid, before the justices

above named, and others their fellows as aforesaid, came A. B., late of, etc.; and the said A. B., on being then and there, to wit, at the said session so holden as aforesaid, before the said justices as aforesaid, demanded a license from the said P. Q., R. S., and X. Y., and others their fellows so as before assembled, in order that he the said A. B. might be authorized and empowered, at a certain house known and distinguished by the sign of the White Swan, at, etc., to sell ale for and during the year next ensuing; but the said P. Q., R. S., and X. Y., and others their fellows so then and there assembled, being justices of our said lady the queen for the county of aforesaid, then and there refused to grant any leave, license, or authority to the said A. B. to sell ale at aforesaid, in the county aforesaid, for the said year then next ensuing; whereupon the said A. B., wickedly and maliciously intending to traduce the authority and impede the proceedings, as well as to vilify the characters of the said justices, so being then and there in the due and proper execution of their duties, uttered and pronounced, and loudly published to the said justices so assembled and met together as aforesaid, in the presence and hearing of divers of her majesty's liege subjects, these false, scurrilous, and contemptuous words of and concerning the said P. Q., R. S., and X. Y., and others their fellows, justices as aforesaid, then and there assembled, and of and concerning the execution of their said duties, that is to say, "You are all (meaning the said P. Q., R. S., and X. Y., and others their fellows, then and there assembled) a parcel of tyrannical villains, and ought to be hanged for depriving a poor man of his bread" (meaning that the said P. Q., R. S., and X. Y., and others their fellows, then and there assembled, ought to be hanged for depriving him the said A. B. of his bread, by refusing him the said A. B. a license to sell ale, which the said A. B. had then and there required from them the said P. Q., etc., and which they the said P. Q., R. S., X. Y., and others their fellows, justices as aforesaid, had then and there refused to grant to him the said A. B.); in disturbance of the administration of justice, and against, etc.(k) (*Conclude as in book 1, chapter 3.*)

(k) Scandalous aspersions of a magistrate in the execution of his office are regarded as criminal, and subject the offender to punishment, at the discretion of the court in which he is convicted. Holt on Lib. 153; 1 Russ. C. & M. 328.

(960a) *Scandalous words to a magistrate.*

That heretofore, to wit, on, etc., at, etc., one J. S. was brought before J. N., Esquire, then being one of the justices, etc. (*stating office*), and the said J. S. was then charged before the said J. N., upon the oath of one A. C., that he the said J. S. had then lately before feloniously stolen, taken, and carried away divers goods and chattels of the said A. C. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said J. S., etc., being a scandalous and ill-disposed person, and wickedly and maliciously intending and contriving to scandalize and vilify the said J. N. as such justice aforesaid, and to bring the administration of justice in this kingdom into contempt, afterwards, to wit, etc., and whilst the said J. N., as justice as aforesaid, was examining and taking the depositions of divers witnesses against him the said J. S., in that behalf, to wit, on the day and year aforesaid, wickedly and maliciously, in the presence and hearing of divers good and liege subjects, etc., did publish, utter, pronounce, declare, and say with loud voice to the said J. N., and whilst the said J. N. was acting as such justice as aforesaid, "You are a scoundrel and a liar; you would hang your own father if you could make a groat by his execution;" to the great scandal and reproach of the administration of justice in this kingdom, to the great scandal and damage of the said J. N., in contempt of our lady the queen, etc., to the evil example, etc., and against the peace, etc. (l) (*Conclude as in book 1, chapter 3.*)

(961) *For seditious words.*(m)

That R. M., late of, etc., being a pernicious and seditious man, and a person of a depraved and disquiet mind, and intending and contriving to terrify and discourage the good people of this

And to these the rule is strictly confined; for if the language, however opprobrious, apply to the justice in his private capacity, no indictment can be supported. So that if a man at a parish meeting apply to an *absent* magistrate abusive names, as if he say, "If he is a sworn justice, he is a rogue and a forsworn rogue;" or if he apply to him the names of an ass, fool, coxcomb, or blockhead, no indictable offence will have been committed. 2 Stra. 1157-8; 2 Salk. 698; 2 Campb. 142. And it seems that to render *any* words thus indictable, they must be spoken *to* the magistrate, and not in his absence. 2 Campb. 142; 2 Stra. 1157; R. v. Read, 1 Stra. 420-1; Dickinson's Q. S. 6th ed. 392.

(l) Arch. C. P. 19th ed. p. 899; Wh. Cr. L. 8th ed. § 1603.

(m) Drawn by Mr. Bradford in 1780, when attorney-general of Pennsylvania.

commonwealth from enlisting into the service thereof, and with all his might endeavoring to prevent the measures carrying on in support of the freedom and independence of America, and to bring the generals and other military officers of the armies of the state and of the said United States into hatred and contempt, and that the said R. M., his wicked contrivances and intentions aforesaid to perfect and render effectual, on, etc., at, etc., and within the jurisdiction of this court, in the presence and hearing of divers liege subjects of this commonwealth, having discourse then and there concerning the army of the said United States, and the commanders and officers thereof, falsely, wickedly, and maliciously and seditiously, these false, scandalous, and malicious and seditious words, with a loud voice did pronounce and say, to wit,⁽ⁿ⁾ "The heads (meaning the generals and other military officers in the said army) of the continental army are convicts and rogues, and all those who join (meaning those who enlist in) the army (the army of the said United States meaning) are worse than fools, for they (meaning those who should so enlist) will be cheated," to the evil example, etc., and against, etc.^(o) (*Conclude as in book 1, chapter 3.*)

(n) It is not enough to lay the substance of the words. They must be laid according to their tenor, though only the substance need be proved. *Updegraph v. Com.*, 11 Serg. & Rawle, 394; *Com. v. Kneeland*, 20 Pick. 206; *Bell v. State*, 1 Swan (Tenn.), 42; *Wh. Cr. L.* 8th ed. §§ 1603-7, 1615. The words, however, must be substantially proved, without the help of any implication or anything extrinsic. *People v. Warner*, 5 Wend. 271; *State v. Bradley*, 1 Hay. 403, 463; *State v. Coffey*, N. C. Term R. 272; *State v. Ammons*, 3 Murph. 123. Should any substantial difference exist between the words proved and those laid, even if laid as spoken in the third person and proved to have been spoken in the second, the defendant must be acquitted. *R. v. Berry*, 4 T. R. 217; *Com. v. Moulton*, 108 Mass. 308. See *Wh. Cr. L.* 8th ed. §§ 1603-7, 1615. But if some of the words be proved as laid, and the words so proved amount to an indictable offence, it will be sufficient. *Com. v. Kneeland*, 20 Pick. 206. And when the words do not constitute the gist of the offence, as where the charge is attempt to extort by threats, then it is enough to set forth the substance. *Com. v. Moulton*, *at supra*. See *Com. v. Goodwin*, 122 Mass. 19.

(o) I have been favored with the rolls of a few indictments used in Philadelphia, in 1716 and thereabouts, several of which relate to this branch of pleading. Two of them are inserted *verbatim et literatim*.

"The grand inquest for our lord the king, upon their respective oaths and affirmations, do present, that Andrew Hamilton, late of the city of Philadelphia, Esq., the tenth day of October, in the first year of the reign of our lord George, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, the third, at the city aforesaid, of the honorable Charles Gookin, Esq., lieutenant-governor of the province of Pennsylvania, then and still being, the wicked, opprobrious, and reproachful words following did speak, utter, and pro-

(962) *Another form for same.(p)*

That N. B., late of, etc., laborer, being a wicked, seditious, and evil disposed person, and greatly disaffected to our said lord the

nounce, viz.: Damn him (the said lieutenant-governor meaning). If he (the said Hamilton himself meaning) ever met the damned dog Gookin (the said lieutenant-governor again meaning) out of the province in which the said Gookin had command, or any other convenient place, that by the eternal God he (the said Hamilton himself meaning) would pistol him, and that he (the said lieutenant-governor again meaning) deserved to be shot or ript open for what he (the said lieutenant-governor again meaning) had done already, and swore by God (he himself again meaning) he could find the heart to do it, and would if he ever had him (the said lieutenant-governor again meaning) in a convenient place, to the evil example of others in like case delinquent, and against the peace of our said lord the king, his crown and dignity."

"The grand inquest of our lord the king, upon their respective oaths or affirmations, presents, that Hugh Loudon, late of the city of Philadelphia, merchant, the tenth day of September, in the year of the reign of our lord George, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, the third, at the city of Philadelphia, of Richard Hill, Esq., mayor of the city aforesaid, and James Logan, Esq., secretary of this province of Pennsylvania (the said Richard Hill and James Logan, justices of the court of common pleas for the city and county of Philadelphia then and still being), the wicked, opprobrious, and reproachful words following, openly and publicly did speak, utter, and pronounce, viz.: that he (himself meaning) was wronged by the judgments of court in two bonds (the court of common pleas held for the city and county of Philadelphia the aforesaid tenth day of September meaning), and that Richard Hill and James Logan (the said Richard Hill and James Logan, who were two of the justices of the said court who gave the said judgment against the said Hugh meaning) were the chief causes thereof, and that he (himself again meaning) would be revenged on them (the said Richard Hill and James Logan again meaning), though to the hazard of his body and soul, to the great contempt and deprivation of the authority and judgment of the said Richard Hill and James Logan and their associates, justices of the court of common pleas, to the evil example of others in such case delinquents, and in manifest contempt of our said lord the king and his laws, and against the peace of our said lord the king, his crown and dignity."

To Mr. Ed. D. Ingraham, of Philadelphia, I am indebted for the following :—
"City of Philadelphia, ss.:

"The grand inquest for our sovereign lord the king who now is, for the body of the city of Philadelphia aforesaid, upon their oath and solemn affirmations respectively do present, that Bryan M'Loughlin, late of the city of Philadelphia, laborer, being a wicked, evil minded persons, and the allegiance due to our sovereign lord George the Second, by the grace of God of Great Britain, France, and Ireland king, defender of the faith, etc., not regarding, but seditiously and maliciously intending to move and excite discord and rebellion within the province of Pennsylvania, and to bring our said sovereign lord the now king into contempt with his subjects, the fourteenth day of June, in the twenty-eighth year of the reign of our said lord the king, at the city of Philadelphia aforesaid, and within the jurisdiction of this court, in the presence and hearing of divers liege subjects of our said lord the now king, wickedly and

king, and contriving and intending the liege subjects of our said lord the king to incite and move to hatred and dislike of the person of our said lord the king, and of the government established within this realm, on, etc., with force and arms, at, etc., in the presence and hearing of divers liege subjects of our said lord the king, maliciously, unlawfully, wickedly, and seditiously did publish, utter, and declare with a loud voice, of and concerning our said lord the king, these words following, that is to say, "His majesty, George the Third (meaning our said lord the king) is . . . , thank God for it; I (meaning the said A. B.) hope he (meaning our said lord the king) will soon be no more; damnation to all royalists;" to the great scandal of our said lord the king, in contempt of our said lord the king and his laws, to the evil and pernicious example of all others in the like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, etc. That the said A. B., being such wicked, seditious, and evil disposed person as aforesaid, and greatly disaffected to our said lord the king, and contriving and intending the liege subjects of our said lord the king to incite and move to hatred and dislike of the person of our said lord the king, and the government established within this realm, on, etc., with force and arms, at, etc., unlawfully, wickedly, maliciously, and seditiously, in the presence and hearing of divers liege subjects of our said lord the king, again did publish, utter, and declare of and concerning our said lord the king, and his good, true, and faithful subjects, these words following, that is to say: "I (meaning the said A. B.) hope king George the Third (meaning our said lord the king) will soon be no more; damnation to all royalists." (*Conclude as before.*)

maliciously did publish, utter, and with a loud voice pronounce English words of the following tenor and effect, that is to say: 'I' (himself the said Bryan M'Loughlin meaning) 'will lose my life for Charley' (Charles, son to the person pretending to be king of England by the style and title of James the Third meaning); 'and I' (himself the said Bryan meaning) 'hope he' (the said Charles again meaning) 'will push up once more and enjoy his own again' (the crown of Great Britain meaning), 'and send Georgey' (our said sovereign king George the Second meaning) 'home to Hanover, where he belongs;' to the great scandal and contempt of our said lord the now king, to the evil and pernicious example of all others in such case offending, and against our said lord the now king, his crown and dignity, etc."

(963) *Uttering blasphemous language as to God.*

That A. B., of, etc., not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and contriving and intending Almighty God to blaspheme and dishonor, on, etc., at, etc., and within, etc., in the presence and hearing of divers good citizens of this commonwealth, unlawfully, wickedly, and blasphemously did say, pronounce, and with a loud voice publish and proclaim these profane and blasphemous English words following, to wit, *(q)* (*here insert the words*), to the great dishonor and contempt of Almighty God, to the evil example of all others in such cases offending, contrary to the form of the act of general assembly in such case made and provided, and against, etc. (*Conclude as in book 1, chapter 3.*)

(964) *Same under Rev. Sts. of Mass. ch. 130, § 15.(r)*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, did wilfully blaspheme the holy name of God, by then and there denying, cursing, and contumeliously reproaching God, his creation, government, and final judging of the world; that is to say, the said C. D., then and there, in the presence and hearing of divers good and worthy citizens of said commonwealth, did wilfully, profanely, and blasphemously speak, pronounce, utter, and publish the profane and blasphemous words following, to wit (*here insert the words spoken and published, verbatim, and with proper innuendoes, if the words require it*); against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(965) *Blaspheming Jesus Christ.(s)*

That R., etc., on, etc., wickedly, maliciously, and blasphemously did utter, and with a loud voice publish, in the presence

(q) The words must be specifically laid, though only the substance need be proved. *R. v. Popplewell*, 2 Str. 686; *R. v. Sparling*, Ib. 498, and other cases cited *Wr. Cr. Pl. & Pr.* § 203.

(r) *Tr. & H. Prec.* 61. See *Wh. Cr. L.* 8th ed. §§ 1431-2, 1443, 1605.

(s) In an argument of great felicity and strength, a conviction under this indictment as at common law, was sustained in 1811 by Chancellor (then chief justice) Kent, when delivering the opinion of the supreme court in *People v. Ruggles*, 8 Johns. 291.

and hearing of divers good and Christian people, etc., of and concerning the Christian religion, and of and concerning Jesus Christ, the false, scandalous, malicious, wicked, blasphemous words following, to wit: "Jesus Christ was a bastard, and his mother must be a whore," to the contempt of the Christian religion and the laws of this state, to the evil example of all others in like manner offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(966) *Blaspheming the Holy Ghost.(t)*

That A. B., of, etc., laborer, being a person of an immoral and irreligious mind and disposition, and intending the Christian religion to revile and bring into contempt, on, etc., at, etc., did wilfully commit the heinous crime of blasphemy, by wilfully cursing and reproaching the Holy Ghost; that is to say, the said A. B. then and there, in the presence and hearing of divers good and worthy citizens of said commonwealth, did wilfully, profanely, and blasphemously speak, utter, publish, and pronounce these profane and blasphemous words following, to wit (*here insert the words spoken, verbatim, with proper innuendoes, if the words require it*); to the great dishonor of religion, good morals, and good manners, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(966a) *Using indecent language in presence of female, under Alabama statute.*

That E. Y., *alias* E. P., etc., entered upon the curtilage of the dwelling-house of L. S., and in the presence of H. S., a female, made use of abusive, insulting, and vulgar language, etc. (*Conclude as in book 1, chapter 3.*)

[A second count alleged that the words were spoken in the presence of E. S. etc.(u)]

(t) Davis's Prec. 73.

(u) Sustained in *Yancy v. State*, 63 Ala. 141. It was held in this case that in an indictment for using insulting, abusive, or vulgar language in the presence of females (Code, § 4203), it is not necessary to set out the words used by the accused; nor is it necessary to prove, on the trial, that the words were heard by the females present. The term "female" seems enough under the statute, though it is applicable to brutes as well as to human beings.

(967) *Composing and publishing blasphemous libel.(v)*

That A. K., etc., of, etc., on, etc., at, etc., with force and arms, disregarding the laws and religion of this commonwealth, and profanely devising and intending to bring the holy scriptures and the Christian religion into disbelief and contempt among the people of this commonwealth, unlawfully and wickedly did compose, print, and publish, and did cause and procure to be composed, printed, and published, a certain scandalous, impious, obscene, blasphemous, and profane libel, of and concerning God, and of and concerning the holy scriptures, and of and concerning the Christian religion, which libel is published and contained in a certain printed sheet of paper, commonly called a newspaper, and said printed sheet of paper containing said libel is entitled "Boston Investigator," volume second, number thirty-nine, whereof said A. K. was editor and publisher, in which said libel and printed sheet of paper, so printed, published, and composed, and so caused and procured to be composed, printed, and published as aforesaid, by said A. K., the said A. K. did wilfully blaspheme the holy name of God, by denying and contumeliously reproaching God, his creation, government, and final judging of the world, and by reproaching Jesus Christ and the Holy Ghost, and contumeliously reproaching the holy word of God. In one part of which scandalous and obscene libel, among other things, there were and are contained certain scandalous, impious, obscene, and blasphemous matter and things, of and concerning Jesus Christ, and of and concerning the Holy Ghost, and of and concerning the holy scriptures, and of and concerning the Christian religion, according to the purport and effect following, to wit (*here follows a passage libelling our Saviour, which, in consequence of its gross obscenity, is omitted*).

And in another part of said libel there were and are contained certain scandalous, impious, profane, and blasphemous matter and things of and concerning God, and of and concerning the Christian religion, according to the purport and effect following, to wit:—

"I cannot pass over the subject of prayer without adverting to

(v) The court held a conviction on this indictment proper in *Com. v. Kneeland*, 20 Pick. 206. See Wh. Cr. L. 8th ed. §§ 1218, 1594, 1605.

the curious and strange predicament that God is placed in, by listening to the unceasing and endless variety, and what is worse, contradictory petitions, that are every moment ascending up or down to him. I think the old gentleman is more a subject of pity than General Jackson was during his late visit; his bowing and shaking was very arduous, but it was all one way, congratulatory and pleasing, and he had some occasional respite, but only think of God having no respite whatever, day or night."

And in another place, said libel contains these scandalous, profane, and blasphemous words, matters, and things following, of and concerning God, to wit:—

"It therefore appears to me that God must have an ear very different from anything I can conceive of, to hear so many contradictory prayers all at once; and I am equally at a loss to imagine how he could recollect them all, and at what time they are apt to be answered. Perhaps he keeps a set of books, and clerks to enter all the prayers in; but another difficulty presents itself. How could he inform all those clerks at one time what to enter? Besides, when would he find time to examine these books so as to answer all the petitions at the proper time?"

And the said libel in another part thereof, among other things, contains the following scandalous, profane, and blasphemous words, matters, and things of and concerning God, and of and concerning Jesus Christ, and of and concerning the holy Scriptures, to wit:—

"1. Universalists believe in a God, which I do not; but believe that their God, with all his moral attributes (aside from nature itself), is nothing more than a mere chimera of their own imagination."

"2. Universalists believe in Christ, which I do not; but believe that the whole story concerning him is as much a fable and a fiction as that of the god Prometheus, the tragedy of whose death is said to have been acted on the stage, in the theatre at Athens, five hundred years before the Christian era."

"3. Universalists believe in miracles, which I do not; but believe that every pretension to them can either be accounted for on natural principles, or else is to be attributed to mere trick and imposture."

"4. Universalists believe in the resurrection of the dead, in immortality and eternal life, which I do not; but believe that all life is mortal, that death is an eternal extinction of life to the individual who possesses it, and that no individual life is, ever was, or ever will be eternal:"

To the great scandal and contumelious reproach of God, and his holy name, his creation, government, and final judging of the world, of Jesus Christ and the Holy Ghost, of the holy words of God, and of the Christian religion, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(968) *Obscene libel. First count, not setting forth libellous matter.*(w)

That P. H., of in the county of laborer, being a scandalous and evil disposed person, and contriving, devising, and intending the morals as well of the youth as of other good citizens of said commonwealth to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, with force and arms, at in the county aforesaid, knowingly, unlawfully, wickedly, maliciously, and scandalously did utter, publish, and deliver to A. B. a certain lewd, wicked, scandalous, infamous, and obscene printed book, entitled "Memoirs of a Woman of Pleasure," which said printed book is so lewd, wicked, and obscene that the same would be offensive to the court here, and improper to be placed upon the records thereof, wherefore the jurors aforesaid do not set forth the same in this indictment; to the manifest corruption and subversion of the youth and other good citizens of said commonwealth in their manners and conversation, in contempt of law, to the evil example, etc., and against, etc.(x) (*Conclude as in book 1, chapter 3.*)

(w) "The fourth and fifth counts in this indictment," said Parker, C. J., in *Com. v. Holmes*, 17 Mass. 336, referring to the two counts in the text, "are certainly good; for it can never be required that an obscene book and picture should be displayed upon the records of the court, which must be done if the description in these counts is insufficient." See also *Com. v. Sharpless*, 2 S. & R. 91. It is necessary, however, that the pleader should expressly aver the indecency of the book or picture as the excuse for its non-setting forth, the same reasoning applying as obtains when a forged instrument is lost, or is in the defendant's possession, where such fact must be averred in order to explain the non-description of the instrument itself. See *supra*, 939, for a further discussion of this question.

(x) In *R. v. Bradlaugh*, 14 Cox. C. C. 68, the defendants were tried in the court of queen's bench (into which court the indictment had been removed by *certiorari*), on an indictment which charged as follows: "That C. D., etc., on,

(969) *Second count. Publishing an obscene picture.*

That the said P. H., being such person as aforesaid, and devising, contriving, and intending as aforesaid, on, etc., at, etc., unlawfully, wantonly, and maliciously did utter and publish to one C. D., a citizen of said commonwealth, a certain lewd, scandalous, and obscene print on paper, representing a man in an indecent and obscene posture with a woman, that is to say, in the act and posture of carnal copulation with each other; which said lewd, scandalous, and obscene print was contained and published in a certain printed book, entitled "Memoirs of a Woman of Pleasure;" to the manifest corruption and subversion of the morals and manners of the youth of this commonwealth and of the citizens thereof, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(970) *Exhibiting obscene pictures.(y)*

That J. S., late, etc., J. H., etc., being evil disposed persons,

etc., at, etc., unlawfully and wickedly devising, contriving, and intending, as much as in them lay, to vitiate and corrupt the morals as well of youth as of divers other subjects of the queen, and to incite and encourage the said subjects to indecent, obscene, unnatural, and immoral practices, and bring them to a state of wickedness, lewdness, and debauchery, unlawfully, etc., did print, publish, sell, and utter, a certain indecent, lewd, filthy, and obscene libel, to wit, a certain indecent, lewd, filthy, bawdy, and obscene book, called 'Fruits of Philosophy,' thereby contaminating," etc. This indictment was held bad for not setting out the passage or passages of the book alleged to constitute the offence; and it was also held that the defect was not cured by verdict. See Wh. Cr. Pl. & Pr. §§ 90, 166, 177, 760. There is no excuse, it will be observed, in the above form, for the non-setting forth of the alleged obscene matter. See *supra*, 939, note.

(y) *Sharpless v. Com.*, 2 S. & R. 91. A verdict was sustained by the supreme court on this indictment, Yeates, J., emphatically declaring: "The destruction of morality renders the power of the government invalid, for government is no more than public order. It weakens the bands by which society is kept together. The corruption of the public mind in general, and debauching the manners of youth in particular, by lewd and obscene pictures exhibited to view, must necessarily be attended with the most injurious consequences, and in such instances courts of justice are or ought to be the schools of morals." See generally Wh. Cr. L. 8th ed. §§ 1606, 1609.

In such an indictment it was said, it need not be averred that the exhibition was public; if it be stated that the picture was shown to sundry persons for money, it is a sufficient averment of its publication. Nor is it necessary that the postures and attitudes of the figures should be minutely described; it is enough if the picture be so described as to enable the jury to apply the evidence and to judge whether or not it is an indecent picture; nor is it necessary to lay the house in which the picture is exhibited to be a nuisance; the offence not being a nuisance, but one tending to the corruption of morals. Wh. Cr. L. 8th ed. § 1609.

and designing, contriving, and intending the morals as well of youth as of divers other citizens of this commonwealth to debauch and corrupt, and to raise and create in their minds inordinate and lustful desires, on, etc., at, etc., and within the jurisdiction of this court, in a certain house there situate, unlawfully, wickedly, and scandalously did exhibit and show for money to persons to the inquest aforesaid unknown, a certain lewd, wicked, scandalous, infamous, and obscene painting, representing a man in an obscene, impudent, and indecent posture with a woman, to the manifest corruption and subversion of youth and other citizens of this commonwealth, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(971) *Against the printer of a newspaper for publishing an advertisement by a married woman offering to become a mistress* (z)

That A. B., late, etc., in the county aforesaid, printer, being a person of an immoral and depraved mind and disposition, and unlawfully contriving and intending to bring the state of matrimony into public contempt and discredit, to corrupt the morals of the people of this commonwealth, and to induce the citizens thereof to commit the crimes of fornication and adultery, on at did unlawfully and wickedly print and publish, and cause and procure to be printed and published, in a certain public newspaper called the (*here insert the title of the newspaper*), a certain immoral and mischievous libel, in the form of an advertisement, which said immoral and mischievous libel is of the purport and effect following, to wit (*here insert the advertisement, verbatim, with proper innuendoes*); to the great scandal and reproach of religion, good morals, and good manners, to the evil and pernicious example of all others in like case to offend, and against, etc. (*Conclude as in book 1, chapter 3.*)

(972) *Indictment for threatening to accuse of an infamous crime.*(a)

That Henry Tiddeman, late of B., in the county of Middlesex, and within the jurisdiction of the central criminal court,

(z) Davis's Prec. 156; 3 Chit. C. L. 887.

(a) This precedent was sustained in *R. v. Tiddeman*, 4 Cox, C. C. 387, where Platt, B., said: "The indictment charges the prisoners with making certain threats, with intent to extort from the prosecutor a valuable security; but it does not state whose property that security was, and the question is, whether or not

laborer, William Landler, late of the same place, laborer, John Bennet, late of the same place, laborer, John Jones, late of the same place, laborer, otherwise called John Joyce, and John Sullivan, late of the same place, laborer, on the second day of March, in the year of our Lord at B. aforesaid, in the county aforesaid, and within the jurisdiction of the said court, feloniously did threaten one Samuel Wyatt, to accuse the said Samuel Wyatt of having committed the abominable crime of buggery^(b) with the said Henry Tiddeman, with a view and with the intent in so doing then and there and thereby to extort and gain from the said Samuel Wyatt a certain valuable security for the payment of money, to wit, a security for the payment of the sum of fifty ; contrary to the form of the statute in such case made and provided, and against the peace. etc.

[*The second count* alleged that the prisoners feloniously did accuse the said Samuel Wyatt of having committed the abominable crime, etc., with the said Henry Tiddeman.]

Third count.

That defendants, etc., feloniously did threaten the said Samuel Wyatt, to accuse the said Samuel Wyatt of having attempted and endeavored to commit the abominable crime, etc., with the said Henry Tiddeman.

the omission is fatal to its validity. The statute on which the indictment is framed is the 10 & 11 Viet. c. 66, s. 2, which makes it an offence to accuse or threaten to accuse any person of the offence specified, with a view or intent to extort or gain from such person any property, money, or security. The words of the statute are exceedingly important, because one of them, namely, 'extort,' has a certain technical meaning, which is defined in 2 Salkeld; and when a man is charged with extorsively taking, the very import of the word shows that he is not acquiring possession of his own. The ordinary form of indictment for extortion may be found in Burn's Justice, and the language there shows that it is not at all necessary that the thing extorted should be said to be the property of any person. In *R. v. Norton*, 8 Carrington & Payne, 186, the indictment was held bad for want of such an averment; but that was an indictment under another statute, which made it necessary that the party charged under it should actually obtain the thing sought to be obtained; but that is not so here, because, whether anything is obtained or not, the crime is complete, and, therefore, whether the property belongs to the person threatened or not, is quite immaterial; the offence is committed immediately the accusation is made, with the evil intent stated in the indictment."

(*b*) The substance of the accusation is enough. *Com. v. Moulton*, 108 Mass. 308; *Com. v. Goodwin*, 122 Mass. 19. See for other forms of this class, *supra*, 414.

Fourth count.

That defendants, etc., did accuse the said Samuel Wyatt of having attempted and endeavored to commit the abominable crime of buggery with the said Henry Tiddeman.

Fifth count.

That defendants, etc., feloniously did threaten the said Samuel Wyatt, to accuse the said Samuel Wyatt of a certain infamous crime, that is to say, of having made to the said Henry Tiddeman a certain solicitation, whereby to move and induce the said Henry Tiddeman to commit with said Samuel Wyatt the abominable crime, etc.

Sixth count.

That defendants, etc., did accuse the said Samuel Wyatt of a certain infamous crime, that is to say, of having made to the said Henry Tiddeman a certain solicitation, whereby to move and induce the said Henry Tiddeman to commit with the said Samuel Wyatt the abominable crime, etc.

Seventh count.

That defendants, etc., did threaten the said Samuel Wyatt, to accuse the said Samuel Wyatt of having committed the abominable crime, etc.

Eighth count.

That defendants, etc., did accuse the said Samuel Wyatt of having committed the abominable crime, etc.

Ninth count.

That defendants, etc., did threaten the said Samuel Wyatt, to accuse the said Samuel Wyatt of having attempted and endeavored to commit the abominable crime, etc.

Tenth count.

That defendants, etc., did accuse the said Samuel Wyatt of having attempted and endeavored to commit the abominable crime, etc.

Eleventh count.

That defendants, etc., did threaten one Samuel Wyatt, to accuse the said Samuel Wyatt of having committed the abominable crime, etc., with the said Henry Tiddeman, with a view and intent thereby to extort money from the said Samuel Wyatt. [There were nine other counts, only varying from the first ten as the eleventh did in alleging the intent to be to extort money.]

(973) *Sending a letter threatening to accuse a person of a crime.*

Mass. Rev. Sts. ch. 125, § 17.(c)

That C. D., late of F., in the county of M., laborer, on the first day of June, in the year of our Lord at F., in the county of M., feloniously, knowingly, wilfully, and maliciously did threaten one E. F. to accuse the said E. F. of having committed the crime of (*here set forth the crime*), by then and there feloniously, knowingly, wilfully, and maliciously sending to the said E. F. a certain written communication, which said written communication is of the following tenor, that is to say (*here set out the letter correctly*),^(d) with intent thereby then and there feloniously, wilfully, and maliciously to extort money from the said E. F.; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(974) *Sending a letter, threatening to burn a dwelling-house.* *Mass.*

Rev. Sts. ch. 125, § 17.

That C. D., late of F., in the county of M., laborer, on the first day of June, in the year of our Lord at F., in the county of M., feloniously, knowingly, wilfully, and maliciously did threaten one E. F. to burn and destroy a certain dwelling-house, of the property of the said E. F. there situate, by then and there feloniously, knowingly, wilfully, and maliciously sending to the said E. F., a certain written communication, which said written communication is of the following tenor, that is to say, etc., with intent thereby then and there feloniously, knowingly, wilfully, and maliciously to extort money from the said

(c) Tr. & H. Proc. 472.

(d) The letter must be set out correctly. R. v. Lloyd, 2 East, P. C. 1123, *supra*, § 940.

E. F.; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(975) *Sending a threatening letter.*(e)

That W. B., late of B., in the county of Surrey, laborer, on the first day of March, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, knowingly and feloniously did send to one J. H. a certain letter, directed to the said J. H., by the name and description of Mr. H., Esquire, accusing the said J. H. of having committed a certain crime punishable by law with death, to wit, the abominable crime of buggery, with the said W. B., with a view and intent thereby then and there to extort and gain money from the said J. H., which said letter is as follows, that is to say: "Sir,—I write to inform you that you have being very unkind, trying to your extreme energies to reflect disparagement on my reputation; in retaliation, I shall make known those liberties and diabolical actions you took with me when I was bathing you in your room, what I term sodomiting. Some compensation I wish to receive from your hands, in one way or another. I am waiting for an answer at the bottom of Stockwell Lane.—Obedient servant, but injured W. B.;" contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(975a) *Another form, under English statute.*

That J. S., etc., on, etc., at, etc., feloniously did send to one J. N. a certain letter directed to the said J. N., * by the name and description of Mr. J. N., demanding money (*or, if other valuable thing, specifying*) from the said J. N., with menaces, and without any reasonable or probable cause (*sic*), he the said J. S. then well knowing the contents of the said letter, and which said letter is as follows, that is to say (*here set out the letter verbatim*), against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said J. S., on the day and year aforesaid, at the county aforesaid, feloniously did utter a certain writing demanding money from the said J. N., with menaces, and without

(e) 1 Cox, C. C. Appendix, p. xi.

any reasonable or probable cause, he the said J. S. then well knowing the contents of the said writing, and which said writing is as follows, that is to say (*here set out the writing verbatim*)(f) against, etc. (*Conclude as in book 1, chapter 3.*)

(975b) *Letter threatening to accuse, under English statute.*

(*Commencement as in last form to **) threatening to accuse him the said J. N. of having attempted and endeavored to commit the abominable crime of sodomy with the said J. S. (*or other crime under statute, specifying it*), with a view and intent thereby then to extort and gain money from the said J. N., he the said J. S. then well knowing the contents of the said letter, and which said letter is as follows, that is to say (*here set out the letter verbatim*), against, etc.(g) (*Conclude as in book 1, chapter 3.*)

(975c) *Threats in order to extort, under English statute.*

Feloniously did threaten one J. N. to accuse him the said J. N. of having attempted and endeavored to commit the abominable crime of sodomy with the said J. S., with a view and intent thereby then to extort and gain money from the said J. N., against, etc.(h) (*Conclude as in book 1, chapter 3.*)

(975d) *Threatening to publish libel with intent to extort, under English statute.*

That J. S., on, etc., at, etc., unlawfully did threaten one J. N. to publish a certain libel of and concerning him the said J. N., with intent to extort money from the said J. N., against, etc.(i) (*Conclude as in book 1, chapter 3.*)

(975e) *Obtaining signature by threats.*

The jurors for, etc., upon their oath present, that A. J., E. J., otherwise called and known as E. H., and F. H., heretofore, to wit, on, etc., with intent to defraud one S. D., did, by certain

(f) Arch. C. P. 19th ed. p. 460. That the letter must be set out see R. v. Lloyd, 2 East, P. C. 1122.

(g) Arch. C. P. 19th ed. p. 464.

(h) Arch. C. P. 19th ed. p. 463. The accusation need not be described in technical language. R. v. Tucker, 1 Mood. C. C. 134. For threatening letters, see 972.

(i) Arch. C. P. 19th ed. p. 921.

unlawful threats of violence to the person of the said S. D., compel the said S. D. to write and affix his name upon and to a certain paper in order that the same might be afterwards used and dealt with as a valuable security, to wit, as a promissory note, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. J., E. J., otherwise E. H., and F. H., heretofore, to wit, on, etc., within, etc., with intent to defraud the said S. D., feloniously did, by certain unlawful threats of violence to the person of the said S. D., induce the said S. D. to write and affix his name upon and to a certain paper, in order that the same might afterwards be used and dealt with as a valuable security, that is to say, a promissory note for the payment of £100, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. J., E. J., otherwise E. H., and F. H., heretofore, to wit, on, etc., within, etc., with intent to injure S. D., feloniously did, by certain unlawful threats of violence to the person of the said S. D., induce the said S. D. to write his name upon and to a certain paper, in order that the same might afterwards be made, converted into, and used and dealt with as a valuable security, to wit, a promissory note, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. J., E. J., otherwise E. H., and F. H., heretofore, to wit, on, etc., within, etc., with intent to injure the said S. D., feloniously did, by certain unlawful threats of violence to the person of the said S. D., induce the said S. D. to write and affix his name upon and to a certain paper, in order that the same might be afterwards used and dealt with as a valuable security, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

And the jurors aforesaid, upon their oath aforesaid, do further present, that the said A. J., E. J., otherwise E. H., and F. H., heretofore, to wit, on, etc., within, etc., with intent to defraud one S. D., feloniously did, by a certain unlawful restraint of the person of the said S. D., induce the said S. D. to write and affix his name upon and to a certain paper, in order that the same might afterwards be made and converted into a valuable security, to wit, a promissory note, against the form of the statute, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

After commencing as in the last count, proceeded: With intent to defraud S. D., feloniously did, by an unlawful restraint of the person of him, the said S. D., compel the said S. D. to write his name upon and to a certain paper, in order that the same might afterwards be made and converted into a valuable security, against the form of the statute, etc.

Seventh count.

After commencing as in the fifth count, proceeded: With intent to injure one S. D., feloniously did, by an unlawful restraint of the person of the said S. D., induce the said S. D. to write his name upon and to a certain paper, in order that the same might afterwards be made and converted into a valuable security, against the form of the statute, etc.

Eighth count.

After commencing as in the fifth count, proceeded: With intent to injure one S. D., feloniously did, by an unlawful restraint of the person of the said S. D., compel the said S. D. to write his name upon and to a certain paper in order that the same might afterwards be used and dealt with as a valuable security, against the form of the statute, etc.

Ninth count.

After commencing as in the fifth count, proceeded as follows: With intent to defraud one S. D., feloniously did, by an unlaw-

ful restraint of the person of the said S. D., induce the said S. D. to make a certain valuable security, to wit, a promissory note for the payment of £100, against the form of the statute, etc.

Tenth count.

After commencing as in the fifth count, proceeded: With intent to defraud one S. D., feloniously did, by certain unlawful threats of violence to the person of the said S. D., compel the said S. D. to make and execute a certain valuable security, to wit, a promissory note for the payment of £100, against the form of the statute, etc.

Eleventh count.

After commencing as in the fifth count, proceeded: With intent to injure one S. D., feloniously did, by certain unlawful threats of restraint of the person of the said S. D., induce the said S. D. to make a certain valuable security, to wit, a promissory note for the payment of £100, against the peace, etc.(*j*)

(975*f*) *Threats, etc., under Indiana statute.*

That on, etc., at, etc., one J. K., etc., did then and there, unlawfully and feloniously, verbally and orally, make threats to one A. H. that he, the said K., would falsely accuse the said A. H. of certain immoral conduct which, if true, would tend to and would degrade and disgrace the said H., to wit, that he, the said A. H., had been keeping one N. D. as his, the said A. H.'s, mistress, and had, at divers times and places, had sexual intercourse with and carnal knowledge of her, the said N. D., not being lawfully married to her, the said N. D., and having then and there a lawful wife living, which said charge and accusation he, the said J. K., did, then and there, verbally and orally, to the said A., threaten to publish, by having it printed in the public newspapers and prints, then and there in circulation among the people of said county and state, and by having the same printed in the form of circulars and handbills, and distributed among the people of said county, with intent then and there and there-

by, to extort, gain, and obtain from him the said A. H., chattels, moneys, and valuable securities of him, the said A. H., the kind, character, description, and value of said chattels, moneys, and valuable securities being to said jurors unknown, and with intent, then and there and thereby, to gain other pecuniary advantages of said H., the exact nature of which is to the grand jurors unknown, and cannot be given.(k) (*Conclude as in book 1, chapter 3.*)

(975g) *Demanding property with menaces with intent to steal, under English statute.*

Feloniously with menaces (*or by force, or with menaces and by force*) did demand of J. N. certain money (*or a certain watch, etc.*), the property of him the said J. N., with intent the said money, from the said J. N. feloniously to steal, take, and carry away; against, etc.(l) (*Conclude as in book 1, chapter 3.*)

(k) Kistler v. State, 54 Ind. 400.

(l) Arch. C. P. 19th ed. p. 459.

CHAPTER VIII.

OFFENCES AGAINST FOREIGN MINISTERS.

- (976) Assault on a foreign minister.
- (977) Contempt of the person of a foreign minister, by threatening bodily harm to another in his presence.
- (978) Arresting a foreign minister.
- (979) Second count. Imprisoning same.
- (980) Third count. Same stated more specially.
- (981) Third count. Same in another shape.
- (982) Issuing process against a foreign minister.
- (983) Opening and publishing letter of foreign minister.

(976) *Assault on a foreign minister.*(a)

That A. B., late of, etc., on, etc., at, etc., and within the jurisdiction of this court, with force and arms, in and upon one C. D., then and there being a public minister, to wit, did make an assault, and him the said C. D., then and there being such public minister as aforesaid, did then and there strike and wound, and other wrongs to the said C. D. then and there did, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That A. B., late of, etc., heretofore, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, in and upon one C. D., then and there being a public minister, to wit, the in the United States of America, duly recognized and received as such by the president of the said United States, did make an assault; and him the said C. D., then and there being such public minister aforesaid, did then and there strike and wound, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(a) Wh. Cr. L. 8th ed. § 1899.

Third count.

(*Like second count, substituting*): “duly received and recognized as such by the department of state of the said United States,” for “duly recognized and received as such by the president of the said United States.”

Fourth count.

That the said A. B., late of, etc., heretofore, to wit, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, in and upon one C. D., then and there being a public minister, to wit, the in the United States of America, did make an assault; and him the said C. D., then and there being such public minister aforesaid, did then and there strike and wound, and did then and there infract the law of nations, by offering violence to the person of the said C. D., so being such public minister as aforesaid, and other wrongs to the said C. D. then and there did, to the great damage of the said C. D., contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

(*Like fourth count, except before*): “did make an assault, and him the said then and there,” etc., *insert* “duly received and recognized as such by the president of the United States.”

Sixth count.

(*Like fourth count, omitting the charge of*): “strike and wound,” etc.

Seventh count.

(*Same as sixth count, inserting before*): “did make an assault,” etc., “duly received and recognized as such by the president of the United States.”

Eighth count.

That the said A. B., late of, etc., heretofore, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, did infract the law of nations, by offering violence to the person of one C. D., the said C. D. then and there being a public minister, to wit, the in the United States of America, to the

great damage of the said C. D., against, etc., and against, etc.
(*Conclude as in book 1, chapter 3.*)

Ninth count.

(*Same as eighth count, inserting after*): “in the United States of America,” and before “to the great damage of the said,” etc., “duly received and recognized as such by the president of the said United States.”

(*For final count, see 17, 18, 181, n., 239, n.*)

(977) *Contempt of the person of a foreign minister, by threatening bodily harm to another in his presence.*(b)

That C. and L., late, etc., on, etc., at, etc., in the dwelling-house of his excellency the French minister plenipotentiary, in the presence of F. B. M., unlawfully and insolently did threaten and menace bodily harm and violence to the person of the said F. B. M., he being consul-general of France to the United States, consul for the state of Pennsylvania, secretary of the French legation, etc., resident in the house aforesaid, and under the protection of the law of nations and this commonwealth, against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(978) *Arresting a foreign minister.*(c)

That P. R. B., late of, etc., on, etc., at, etc., did imprison one L. B., he the said L. B. then and there being a public minister,

(b) *Res. v. De Long Champs*, 1 Dall. 111; Wh. Cr. L. 8th ed. § 1899.

(c) *U. S. v. Benner*. This indictment was drawn by Mr. G. M. Dallas in 1830, and was sustained in 1 Bald. 234. See Wh. Cr. L. 8th ed. §§ 87, 649, 1899. On a motion for arrest of judgment, Mr. Justice Baldwin said:—

“The reasons are two:

“1. That the only count on which the verdict is given against the accused does not describe him as an officer; does not charge him with having executed process, nor state any offence against any act of congress or law of the United States.

“2. That the said count does not state that a public minister of any foreign power or state, authorized and received as such by the president of the United States, was imprisoned, or was or might have been arrested or imprisoned.

“The act of congress upon which this indictment is framed provides, in its different sections, for different classes of cases, and the counts of the indictment are made to meet the different provisions of these sections. The twenty-fifth section enacts, that, if any writ or process shall be sued forth or prosecuted in any of the courts of the United States, or of a particular state, whereby the person of any ambassador, or other public minister of any foreign prince or

to wit, the secretary of the legation from his majesty the king of Denmark, near the United States of America, in manifest,

state, authorized and received as such by the president of the United States, may be arrested or imprisoned, etc., such writ or process shall be adjudged to be utterly null and void.

"The twenty-six section enacts, that in case any person or persons shall sue forth or prosecute any such writ or process, such person or persons, and all attorneys or solicitors prosecuting or soliciting in such case, and all officers executing any such writ or process, being thereof convicted, etc.

"The twenty-seventh section enacts, that if any person shall violate any safe conduct, or passport duly obtained, and issued under the authority of the United States, or shall strike, wound, imprison, etc., by offering violence to the person of an ambassador or other public minister, such person, etc.

"The twenty-fifth and twenty-six sections afford protection and redress for public ministers, authorized and received as such by the president of the United States, and against arrest and imprisonment under and by virtue of any writ or process, sued forth and prosecuted in any court of the United States, or of a particular state, or by any judge or justice therein, and all the counts in this indictment intended to charge an offence in violation of these sections, do state that L. B. was a public minister, authorized and received as such by the president of the United States; that a writ was sued forth against him from an alderman of the city of Philadelphia, and that the defendant, being an officer, did execute the said writ, and thereby arrest the person of the said L. B.; upon these counts the defendant is acquitted by the verdict of the jury.

"The twenty-seventh section of the act is intended to cover other cases not described in the preceding sections, and makes it penal for any person to imprison the person of a public minister, although he may not be authorized and received as such by the president of the United States, and although the person who thus offers violence to his person be not an officer, and does it not by virtue of any writ or process from any court, judge, or justice. The count on which the defendant has been convicted, charges the offence punishable under this section of the act; which does not require that the defendant should be an officer having executed process, nor that the public minister, who was imprisoned, should have been authorized and received as such by the president of the United States.

"The reasons for a new trial will now be considered.

"The second count on which the defendant has been convicted relates to the same transaction, and the same public minister as the first, of which he is acquitted, and differs from it only in describing the minister as an attache to the legation of Denmark, and the first calls him the secretary of the legation; but it was the clear right of the jury, and so it was given them in charge, to find a general verdict of guilty, leaving it to the court to apply it to the counts in the indictment, or to select for themselves the count on which they would render the verdict, as in their opinion the evidence might warrant. If the count were bad in itself, such a verdict could not be maintained; but it is no objection to it, that it is substantially the same with another count on which the defendant has been acquitted, for the different counts of an indictment always relate to the same transaction, describing it in different ways, or with different circumstances, that the jury may apply their verdict to all or either of them, as the evidence shall warrant; or if the verdict be generally guilty, the application of it is made by the court. No injury or injustice is done to the defendant, who is put but once on his trial for the same offence. The jury, in this case, have not selected the count for their verdict of conviction to which the evidence most particularly applies; but this was for them to judge of, and is no cause of com-

infraction of the law of nations, contrary, etc., and against, etc.
(*Conclude as in book 1, chapter 3.*)

(979) *Second count. Imprisoning same.*

That the said P. R. B., afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, did imprison the said L. B., he the said L. B. then and there being a public minister, to wit, an attache to the legation of his majesty the king of Denmark, near the United States of America, in manifest infraction of the laws of nations, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(980) *Third count. Same as first, stated more specially.*

That heretofore, to wit, on, etc., at, etc., and within the jurisdiction of this court, a certain writ was sued forth and prosecuted by one G. H. U., from one J. B., then and there an alderman of the city of Philadelphia, whereby the person of the said L. B., then and there as aforesaid being a public minister, to wit, the secretary of the legation of his majesty the king of Denmark, near the United States of America, authorized and received as such by the president of the United States, was then and there arrested; and that the said P. R. B., afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, being then and there an officer, to wit, a constable of the city of Philadelphia, with force and arms, did execute the said writ, and then and there and thereby arrest the person of the said L. B., then and there being as aforesaid a public minister as aforesaid, in violation of the laws of nations, to the great disturbance of the public repose, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(981) *Fourth count. Same in another shape.*

That afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, a certain writ was sued forth and prosecuted by one G. H. U., from one J. B., then and there an alder-

plaint on the part of the defendant; it cannot affect his punishment, and is clearly sustained by the evidence.

“It is our opinion that the reasons filed in the arrest of judgment are not maintained, and it is ordered that the motion be overruled.”

man of the city of Philadelphia, whereby the person of the said L. B., then and there as aforesaid being a public minister, to wit, an attache of the legation of his majesty the king of Denmark. near the United States of America, authorized and received as such by the president of the United States, was then and there arrested ; and that the said P. R. B., afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, being then and there an officer, to wit, a constable of the city of Philadelphia, with force and arms, did execute the said writ, and then and there and thereby as aforesaid arrest the person of the said L. B., then and there being as aforesaid a public minister as aforesaid ; in violation of the laws of nations, to the great disturbance of public repose, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*Add counts for offering violence and assaulting.*)

(982) *Issuing process against a foreign minister.*(d)

That on, etc., at, etc., A. D., being then and there a public minister of a foreign prince, to wit, the envoy extraordinary and minister plenipotentiary of his majesty the emperor of all the Russias, and being then and there duly authorized and received as such by the president of the United States of America, T. M., late of, etc., then and there knowingly, wilfully, and unlawfully did sue forth certain process in a court of the state of Pennsylvania, to wit, in the district court for the city and county of Philadelphia, in the words and characters following, that is to say (*here set forth the process*), and whereby the (person) of the said A. D., then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias aforesaid, then and there being duly authorized and received as such by the president of the United States of America as aforesaid, might be (arrested and imprisoned). And that D. A., late of the said district of Pennsylvania, attorney at law, was then and there the attorney knowingly, wilfully, and unlawfully prosecuting in the said case, to wit, in the said process then and there sued forth by the said T.

(d) This indictment was drawn by Mr. A. J. Dallas in 1813. The defendant was never tried.

M. as aforesaid, whereby the (person) of the said A. D., then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias as aforesaid, then and there duly authorized and received as such by the president of the United States, as aforesaid, might be (arrested and imprisoned) as aforesaid. And that J. S., late of, etc., being then and there an officer employed for the service of process issuing for the said district court for the city and county of Philadelphia, in the district aforesaid, to wit, a deputy of the sheriff of the county of Philadelphia, in the district of Pennsylvania aforesaid, did then and there knowingly, wilfully, and unlawfully execute the said process, by then and there serving personally upon the said A. D., then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias, then and there duly authorized and received as such by the president of the United States of America as aforesaid, a copy of the said process, to wit, the said process then and there sued forth by the said T. M. as aforesaid, whereby the said A. D., then and there being a public minister, to wit, the envoy extraordinary and minister plenipotentiary of his said majesty the emperor of all the Russias as aforesaid, then and there duly authorized and received as such by the president of the United States as aforesaid, might be (arrested or imprisoned), to wit, on, etc., at, etc., and within the jurisdiction of this court; the said T. M., D. A., and J. S., then and there knowingly, wilfully, and unlawfully in manner aforesaid violating the laws of nations, and disturbing the public repose, against, etc., and against, etc., (*Conclude as in book 1, chapter 3.*)

Second count.

Same as first, changing "person," whenever it occurs in brackets, into "goods and chattels," and "arrested and imprisoned," into "distained, seized, and attached."

Third count.

Same as first, omitting, wherever they occur, the words "wilfully and knowingly."

Fourth count.

Same as second, omitting, wherever they occur, the words "wilfully and knowingly."

(983) *Opening and publishing letter of foreign minister.*(e)

That whereas, mutual peace, amity, and good understanding did, on, etc., and still do subsist between the said United States and the king of Great Britain, and the ambassadors and public ministers of each of the said powers are lawfully and justly entitled to perfect freedom, immunity, and security in their persons, papers, letters, and dispatches, within the territory of the other powers ; and whereas, on the said tenth day of June, in the year aforesaid, in the district aforesaid, and within the jurisdiction of this court, R. L., Esq., was ambassador and minister plenipotentiary from the said king of Great Britain to the said United States of America, and in that capacity resided at, etc., being the seat of the government of the said United States, and was so acknowledged and received by the president of the said United States, and then and there was entitled, among other rights, privileges, and immunities belonging and due to ambassadors and public ministers from foreign powers, to write to and correspond with the public servants and agents of his said sovereign the king of Great Britain, freely and without interruption, confidentially and with secrecy, and to have his public and private letters and dispatches safely, securely, and without examination or interruption, carried and conveyed through any part of the territory of the said United States ; and whereas, the said R. L., Esq., so being an ambassador and public foreign minister, acknowledged, received, and resident as aforesaid, on the said tenth day of June, in the year aforesaid, in the district aforesaid, and within the jurisdiction of this court, had written a certain letter on business respecting the public duties of the said R. L., in his public capacity aforesaid, to a certain J. R., Esq., president of the British province of Upper Canada, the said J. R. then and there being a public agent of the said king

(e) *U. S. v. Thomas*, Phil. 1800. This indictment was drawn by Mr. Rawle, then district attorney, but was never tried.

of Great Britain, to wit, in Upper Canada aforesaid, which letter bore date, etc., and also a certain other letter on such business, to the same J. R., Esq., which other letter bore date, etc., and the same two letters closed in a packet sealed with the seal of the said R. L., and subscribed with his the said R. L.'s name, to wit, with the letters "R. L.," and directed to the said J. R., Esq., by the words "The Honorable President R., etc., Toronto, Upper Canada," he the said R. L., so being ambassador and public minister as aforesaid, had caused to be delivered to a messenger or person employed for the purpose of safely conveying the same to the said J. R., Esq.; that D. T., late, etc., J. T., late, etc., and G. R., late of, etc., yeoman, well knowing the premises, but contriving and unjustly intending to interrupt and disturb the peace, amity, and good understanding subsisting between the said United States and the said king of Great Britain, on, etc., at, etc., and within the jurisdiction of this court, maliciously, unlawfully, and without the license of the said R. L., Esq., the said sealed packet, superscribed and directed as aforesaid, inclosing the said two letters, did break open, and the said two letters did then and there open and read, and the contents thereof did then and there promulgate and make publicly known.

And the grand inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said D. T., J. T., G. P., and also W. D., late of, etc., contriving and unjustly intending as aforesaid, afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, unlawfully and maliciously, and without the license of the said R. L., Esq., he the said R. L., Esq., then and there still being and continuing ambassador and minister plenipotentiary from the said king of Great Britain to the said United States, did print and publish, and cause to be printed and published, the substance of the contents of the said two letters in a certain newspaper printed in Philadelphia aforesaid, called "The General Advertiser or the Aurora," in contempt and violation of the laws of nations, against the form of the treaty between the said United States and the said king of Great Britain, to the great damage of the said R. L., Esq., so being ambassador and minister plenipotentiary from the said king of Great Britain to the said United States, and against, etc.
(Conclude as in book 1, chapter 3.)

CHAPTER IX.

BIGAMY, ADULTERY, AND FORNICATION.(a)

[So far as these offences approach open lewdness and lasciviousness, they are examined *supra*, 705-776, where the general principles applying to them as such are considered.]

(985) Bigamy under English statute.

POLYGAMY, BIGAMY, INCEST, ETC.

(986) Polygamy in Massachusetts.

(986a) Another form.

(987) For polygamy, by continuing to cohabit with a second wife in Massachusetts. Rev. Sts. of Mass. ch. 130, § 2.

(988) Bigamy in New York.

(989) Bigamy in Pennsylvania, against the man.

(990) Bigamy in Pennsylvania, against the woman.

(991) Bigamy. Where the first marriage took place in Virginia, under the Ohio statute.

(992) Bigamy. Where the first marriage took place in another county of Ohio.

(993) Bigamy in North Carolina.

(994) Polygamy under §§ 5, 6, ch. 96, Rev. Sts. Vermont, where both marriages were in other states than that in which the offence is indicted.

(995) Adultery in Massachusetts, under Rev. Sts. ch. 130, § 1, against both parties jointly.

(996) Adultery by a married man with a married woman, in Massachusetts.

(997) Adultery in Pennsylvania against the man.

(998) Same against the woman.

(999) Living in a state of adultery, under Ohio statute. A married woman deserting her husband, etc.

(1000) Against an uncle and niece for an incestuous marriage, as a joint offence, in Virginia.

(1001) Adultery in North Carolina, against both parties jointly.

(1002) Fornication and bastardy in South Carolina, against the man.

(1003) Same in Pennsylvania.

(1004) Same against a woman.

(a) See Wh. Cr. L. 8th ed. § 1683 *et seq.*

(985) *Bigamy under English statute.*(b)

That J. S., on, etc., at, etc., did marry one A. C., spinster, and her the said A. then and there had for his wife, and that the said J. S. afterwards, and whilst he was so married to the said A. as aforesaid, to wit, on, etc., at, etc., feloniously and unlawfully did marry and take to wife one M. Y., and to her the said M. was then and there married, the said A., his former wife, being then alive;(c) against, etc. And the jurors aforesaid, on their oath aforesaid, do further present,(c') that the said J. S., after-

(b) Arch. C. P. 19th ed. p. 948. This last clause is essential under the statute. 1 Russ. C. & M. by Greeves, 4th ed. 274; R. v. Soluley, 1 C. & R. 150.

(c) This is adequate. *Murray v. R.*, 7 Q. B. 700. A variance as to the second wife's name is fatal, it being necessary to individuate her, in order to determine the offence. *R. v. Seeley*, 4 C. & P. 579; 1 Mood. C. C. 303; *Hutchins v. State*, 28 Ind. 34; *Com. v. Whaley*, 6 Bush, 266; *State v. Loftin*, 2 Dev. & Bat. 31. But the weight of authority is that it is not necessary to set forth the name of the first wife. And if we follow the analogy of indictments for receiving stolen goods, we should hold that the more general statement is enough. If we are forced to state in detail the marital relations of the parties, it would be necessary to go still further, and aver that the first wife or husband of the defendant was capable of consenting to marriage, and was not bound by other matrimonial ties. As, however, the first marriage in all its relations is simply matter of inducement, it is enough to state it in general terms, without specifying the details. If these are needed for justice, they can be supplied by a bill of particulars. *Contra*, *State v. La Bore*, 26 Vt. 265. Where, however, the details of the first marriage are given, a variance in the name is fatal. *R. v. Gooding*, C. & M. 297. The exceptions in the statute, when not part of the description of the offence, need not be negatived. *Murray v. R.*, 7 Q. B. 700; *State v. Abbey*, 29 Vt. 60; *Com. v. Jennings*, 121 Mass. 50; *Fleming v. People*, 27 N. Y. 399; *Stanglein v. State*, 17 Oh. Stat. 453; *State v. Williams*, 20 Iowa, 98; *State v. Johnson*, 12 Minn. 476; *State v. Loftin*, 2 Dev. & Bat. 31. It is otherwise where the exception describes the offence in the enacting clause. *Fleming v. People*, 27 N. Y. 329. Nor is it necessary to allege that the defendant knew at the time of his second marriage that his former wife was then living, or that she was not beyond seas, or to deny her continuous absence for seven years prior to the second marriage. *Barber v. State*, S. C. Md. 1879, citing *Bode v. State*, 7 Gill, 316.

Where an indictment, under the Massachusetts statute, alleged that the defendant, on a certain day, was lawfully married to A.; and that afterwards, on a certain day, he "did unlawfully marry and take to his wife one B., he, the defendant, then and there being married and the lawful husband of the said A., she, the said A., being his lawful wife, and living, and he, the said defendant, never having been legally divorced from the said A.;" and it was proved that the defendant was lawfully married to A.; that afterwards she was duly divorced from him for misconduct on his part; and that he then married B.; it was ruled, that there was a variance between the allegations and the proof. *Com. v. Richardson*, 126 Mass. 34.

(c') By the English act, the county where the offender is apprehended or is in custody, has jurisdiction of the offence, and this is the cause of the averments to that effect in the text; which of course can be discharged as surplusage in this country, where no such provision as to venue exists.

wards. to wit, on, etc., at, etc. (*stating place of arrest*), within the jurisdiction of the said court, was apprehended for the felony aforesaid. (*Conclude as in book 1, chapter 3.*)

(986) *Polygamy in Massachusetts.(d)*

That M. M., of, etc., wife of one P. M., the younger of that name, at, etc., on, etc., she being then a single woman unmarried, by the name of M. D., was lawfully married, according to the laws of said commonwealth, to said P. M., the younger of that name, and him then and there had and took for her husband, and cohabited with him as his lawful wife, and that afterwards she the said M., on, etc., at, etc., did unlawfully marry and take to her husband one W. M. B., she the said M. then and there being married and the lawful wife of said P. M., he the said P. M. then being her former husband and living, she the said M. never having been legally divorced from the bonds of matrimony from the said P. M. ; and that afterwards, to wit, hitherto, at, etc., she the said M., after having married said W. M. B., continued to cohabit with said W. M. B., as her second husband, in this state, to wit, at, etc., whereby and by force of the statute in such case made and provided, she the said M. is deemed to be guilty of the crime of polygamy ; and so the jurors aforesaid, on their oath aforesaid, do present and say, that said M. M., in manner and form aforesaid, and at the time and place aforesaid, at, etc., did commit the crime of polygamy, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(986a) *Polygamy in Mass. under Rev. Stat. ch. 165.*

That “ W. II. J., of N., in the county of II., on, etc., at, etc., he, the said W. II. J., being then and there a single man unmarried, was lawfully married to one A. G., and her, the said A. G., then and there had and took for his the said W. II. J.’s lawful wife, and that afterwards, he, the said W. II. J., on, etc., at, etc., did unlawfully marry and take to his wife one II. J., he,

(d) See *Com. v. Mash*, 7 Mete. 472, where this count was held good. In this case it was held, that under the Rev. Sts. ch. 130, § 2, if a woman who has a husband living marry another person, she is punishable, though her husband has voluntarily withdrawn from her, and remained absent and unheard of, for any term of time less than seven years, and though she honestly believes, at the time of her second marriage, that he is dead.

the said W. II. J., being then and there married and the lawful husband of the said A. G., she the said A. G., then being his former wife and then living, and he, the said W. II. J., never having been lawfully divorced from the said A. G.; and that the said W. II. J. afterwards did cohabit with the said H. J., his second wife, in this state, to wit, at N., in the said county of H., for a long space of time, to wit, for the space of six months; whereby, and by force of the statute in such case made and provided, he, the said W. II. J., is deemed guilty of the crime of polygamy. And so the jurors aforesaid, upon their oath aforesaid, present, that said W. II. J., in manner and form aforesaid, at, etc., on, etc., did commit the crime of polygamy; against the peace," etc.(e) (*Conclude as in book 1, chapter 3.*)

(987) *For polygamy, by continuing to cohabit with a second wife in Massachusetts. Rev. Stat. of Mass. ch. 130, § 2.(f)*

The jurors, etc., upon their oath present, that C. D., late of, etc., on the first day of June, in the year of our Lord at B., in the county of S., was lawfully married to one A. B., and the said A. B. then and there had and took for his lawful wife, and that afterwards, to wit, on the first day of July, in the year of our Lord at B., in the county of S., the said C. D. feloniously and unlawfully did marry and take to wife one E. F., the said C. D. then and there being married and the lawful husband of the said A. B., the said A. B. then being his former wife and living, and the said C. D. never having been legally divorced from the said A. B.; and that the said C. D. afterwards did cohabit, and continue to cohabit, with the said E. F., as his second wife in this state, to wit, at B., in the county of S., and commonwealth aforesaid, for a long space of time, to wit, for the space of six months; and (*here proceed to negative the excepted cases in the following section*). Whereby, and by force of the statute in such case made and provided, the said C. D. is deemed

(e) The above indictment was sustained in *Com. v. Jenning*, 121 Mass. 47, under Gen. Stat. c. 165, § 4, which enacts that "whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall (except in the cases mentioned in the following section) be deemed guilty of polygamy." It was held that the exception, stated in § 5, of a person whose husband or wife has been absent for seven years, and not known to be living; need not be negated.

(f) Tr. & H. Prec. 440.

guilty of the crime of polygamy. And so the jurors aforesaid, on their oath aforesaid, do say, that the said C. D., in manner and form aforesaid, at, etc., on, etc., did commit the crime of polygamy; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(988) *Bigamy in New York.*

That A. B., late of, etc., yeoman, on, etc., did marry one C. D., and her the said C. D. did then and there have for his wife; and that the said A. B. afterwards, to wit, on, etc., with force and arms, feloniously did marry and take as his wife one E. F., and to the said E. F. was then and there married (the said C. D. being then and there living, and in full life), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(989) *Bigamy in Pennsylvania, against the man.(g)*

That J. L., late, etc., yeoman, on, etc., at, etc., did marry one M. F., spinster, and her the said M. F. then and there had for his wife, and that the said J. L. afterwards, to wit, on, etc., with force and arms, etc., at, etc., feloniously did marry and to wife did take one E. R., spinster, and to her the said E. R. then and there was married (the said M. F. his former wife being then living, and in full life), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(990) *Bigamy in Pennsylvania, against the woman.(h)*

That H. S., otherwise called H. I., the wife of E. I., late of, etc., yeoman, on, etc., being then married, and then the wife of the said E. I., with force and arms, at, etc., did unlawfully marry and take to husband one D. K., late of, etc., yeoman, and him the said D. K. did unlawfully receive and have as her husband aforesaid, the said E. I., her former husband, being then alive, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(g) Drawn in 1795, by Mr. Jared Ingersoll, then attorney-general of Pennsylvania.

(h) Drawn in 1790, by Mr. Bradford, then attorney-general of Pennsylvania.

(991) *Bigamy. Where the first marriage took place in Virginia, under Ohio statute.(i)*

That A. B., late of the county of Logan aforesaid, on the twenty-fourth day of August, in the year of our Lord one thousand seven hundred and ninety-six, at the county of Rockingham, in the state of Virginia, did marry one M. N., and her the said M. N. then and there had for his wife; and that the said A. B. afterwards, to wit, on the seventh day of July, in the year of our Lord one thousand eight hundred and thirty-seven, at the county of Logan aforesaid, in the state of Ohio, being then married to and the lawful husband of the said M. N., did unlawfully marry and take to wife one O. P., and to her the said O. P. was then and there married; the said M. N., his former wife, being then living and in full life. (*Conclude as in book 1, chapter 3.*)

(992) *Bigamy. Where the first marriage took place in another county of Ohio, under Ohio statute.(j)*

That A. B., late of the county of Logan, in the state of Ohio, on the twenty-sixth day of September, in the year of our Lord one thousand eight hundred and forty-two, at the county of Greene, in the state of Ohio, did marry one M. N., and her the said M. N. then and there had for his wife, and that the said A. B. afterward, to wit, on the twelfth day of December, in the year of our Lord one thousand eight hundred and forty-three, at the county of Logan aforesaid, in the state of Ohio, being then married to and the lawful husband of the said M. N., did unlawfully marry and take to wife one C. D., and to her the said C. D. was then and there married, the said M. N., his former wife, being then still living and in full life. (*Conclude as in book 1, chapter 3.*)

(993) *Bigamy in North Carolina.(k)*

That T. N., late of, etc., on, etc., in, etc., did marry one M. B., spinster, and her the said M. B. then and there had for his wife, and that the said T. N. afterwards, to wit, on, etc., with force

(i) Warren's C. L. 332.

(j) Warren's C. L. 332.

(k) This form was sustained in *State v. Norman*, 2 Dev. 222.

and arms, in, etc., feloniously did marry and take to wife one P. S., spinster, and to her the said P. S. then and there was married, the said M. B., his former wife, being then alive and in full life, in, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(994) *Polygamy, under §§ 5, 6, ch. 96, Rev. Sts. Vermont, where both marriages were in other states than that in which the offence is indicted.*(l)

That W. P., on, etc., at, etc., did marry one H. P., and her the said H. then and there had for his wife, and to her the said H.

(l) *State v. Palmer*, 18 Vt. 570. The indictment in this case was founded on sections five and six of chapter ninety-nine of the revised statutes, which are in these words:—

Sect. 5. If any person, who has a former husband or wife living, shall marry another person, or shall continue to cohabit with such second husband or wife in this state, he or she shall, except in the cases mentioned in the following section, be deemed guilty of the crime of polygamy, and shall be punished by imprisonment, as in the case of adultery.

Sect. 6. The provisions of the preceding section shall not extend to any person whose husband or wife shall have been continually beyond the sea or out of the state for seven years together, the party marrying again not knowing the other to be living within that time; or to any person who shall be, at the time of such marriage, divorced by sentence or decree of any court having legal jurisdiction for that purpose; or to any person or persons in case the former marriage has or shall by sentence of such court be declared null and void; or to any person when the former marriage was within the age of consent, and not afterwards assented to.

"We are of opinion," said the court, "that the indictment is insufficient. The second marriage being in the state of New Hampshire, of whose laws we cannot judicially take notice, the respondent committed no offence against the laws of this state by such marriage; and, unless that marriage was unlawful by the laws of New Hampshire, Jane Cheney became his lawful wife, and perhaps the woman to whom he was formerly married by the same law ceased to be his wife. It could be no offence in him to cohabit in this state with the woman to whom he was lawfully married. There should, therefore, have been an allegation that the second marriage in New Hampshire was unlawful, or the respondent committed no offence by continuing to cohabit with the woman in this state. We are of opinion that, without such an allegation, the indictment cannot be sustained. If the second marriage had been in this state, inasmuch as it was illegal, the former wife being living and the lawful wife of the person charged, the illegality of the second marriage would have been apparent, and the court could have judicially recognized its illegality.

"There is another objection raised to the indictment, which we are not disposed to decide at this time, with the limited means and time which we have for investigating it,—that is, whether the indictment should not have alleged that the respondent was not within any of the exceptions named in the providing clause.

"The general rule is, that when the exceptions are contained in the enacting clause, the indictment must negative them, and state that the respondent does not come within them; but when they are contained in a separate section, the respondent must show, in defence, that he comes within them. There is cer-

then and there was married, and that the said W. P. afterwards, to wit, at, etc., on, etc., did marry and to wife did take one J. C., and to her the said J. C. then and there was married; the said H., his former wife, being then and still alive (and the said marrying and taking to wife by the said W. of the said J., being unlawful by the laws of the state of New Hampshire), and that the said W. P., at, etc., from, etc., till the finding of this inquisition, feloniously did continue to cohabit with said J., his second wife, the said H., his former wife, being then and still living, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(995) *Adultery in Massachusetts, under Rev. Sts. ch. 130, § 1, against both parties jointly.*(m)

That C. E., late of, etc., and E. R. F., the wife of J. N., late, etc., on, etc., at, etc., did commit the crime of adultery with each other, by him the said C. E. having then and there carnal knowledge of the body of said E. R. F., and by her the said E. R. F. having carnal knowledge of the body of the said C. E., she the said E. R. F. being then and there a married woman, and having a lawful husband alive, and not being then and there the wife of said C. E.(n) (and the said C. E. being then and there a married man, and then and there having a lawful wife alive other than the said J. S.), and the said C. E. and the said E. R. F. not being

tainly great plausibility in the argument, that, as the exceptions are mentioned in the enacting clause of the fifth section, referring to the next section for the particulars, it should have been alleged that the respondent was not within them. This point, however, is not decided.

"It may also be worthy of some consideration, whether some further legislation is not necessary to provide for a case, where both marriages are in a foreign government, the party continuing to cohabit with only one wife in this state. It is evidently a case not specially provided for, although the terms of the statute may be broad enough to reach such a case, if the second marriage was illegal."

I have inserted a clause in the form in this text to bring it up to the opinion of the supreme court on the first point. On the second point the current of authority, as well as the course of practice, is to consider it unnecessary to negative the exceptions of the defendant's wife having been beyond sea for seven years, etc., or a divorce having been granted.

(m) This method of joinder of the guilty agents was approved in *Com. v. Elwell*, 2 Mete. 190. It is not necessary, it was held in the same case, to allege that the one party knew the other was married. See *Com. v. Call*, 21 Pick. 510. The offence is completed by carnal intercourse by a married person with a third party, whether such third party be married or not. *Ib.*

(n) This allegation is essential. *State v. Thurstin*, 35 Me. 205; *State v. Hutchinson*, 36 Me. 261; *Moore v. Com.*, 6 Mete. 243; *Wh. Cr. L.* 8th ed. § 1714.

then and there lawfully married to each other; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(996) *Adultery by a married man with a married woman, in Massachusetts.(o)*

That A. B., of, etc., yeoman, on, etc., at, etc., did commit the crime of adultery with one C. D.,^(p) the lawful wife of one E. F.,^(q) by then and there having carnal knowledge of the body of her the said C. D., he the said A. B. being then and there a married man, and having a lawful wife alive, and he the said A. B. not being married to the said C. D.; and she the said C. D. being then and there a married woman, and the lawful wife of the said E. F., against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(997) *Adultery in Pennsylvania, against the man.(r)*

That A. L., of, etc., laborer, on, etc., at, etc., and within the jurisdiction of this court, then and there being a married man, and having a wife in full life, did commit adultery with a certain C. S. (she the said C. S. not being the wife of the said A. L.),^(s) and a bastard child on the body of her the said C. S. then and there did beget, against, etc. (*Conclude as in book 1, chapter 3.*)

(998) *Same against the woman.(t)*

That C. B., of, etc., wife of J. B., on, etc., at, etc., then and there being a married woman, and having a husband in full life, adultery with a certain J. R., of the same county, mariner, did commit, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(o) See *Com. v. Moore*, 6 Metc. 243; *Com. v. Reardon*, 6 Cush. 78.

(p) It will be sufficient, even though the woman is stated to be "a certain woman whose name is to said jurors unknown." *Com. v. Thompson*, 2 Cushing, 551.

(q) This is sufficient. *Com. v. Thompson*, 2 Cushing, 551; *Com. v. Reardon*, 6 Cushing, 78.

(r) See *Reed's Digest*.

(s) This averment is prudent. See cases cited above; *Wh. Cr. L.* 8th ed. § 1728. It is said in Pennsylvania that the husband of the woman with whom the defendant committed adultery should be named. *Com. v. Corson*, 2 Parsons, 475. This, however, may be doubted. *Helfrich v. Com.*, 33 Penn. St. 68.

(t) See *Reed's Digest*.

(999) *Living in a state of adultery, under Ohio statute. A married woman deserting her husband, etc.*

That A. B., late of Parma, in the county of Cuyahoga aforesaid, on the thirteenth day of October, in the year of our Lord one thousand eight hundred and forty-two, at the township of Parma, in said county, was a married woman, being then and there married to and the lawful wife of one M. N.; and that the said A. B. did then and there unlawfully desert her said husband, M. N.; and then and there, on the said thirteenth day of October, in the year aforesaid, and from said day continually until the first day of January, in the year of our Lord one thousand eight hundred and forty-three, in the county of Cuyahoga aforesaid, the said A. B. did unlawfully live and cohabit with a man other than her said husband, M. N., in a state of adultery, to wit, with one C. D., she the said A. B., then and there and all the time aforesaid, being a married woman, and her said husband, M. N., being then and all the time aforesaid, alive.(u)

(1000) *Against an uncle and niece for an incestuous marriage, as a joint offence, in Virginia.(v)*

That W. T., etc., on, etc., with force and arms, at, etc., and within the jurisdiction of the supreme court of law, holden in and for the said county of unlawfully, wilfully, and incestuously did intermarry with, and take to be his wife, a certain N. H., the niece of the said W. T., being the daughter of

(u) Warren's C. L. 336.

(v) Hutchins v. Com., 2 Va. Cases, 332. Upon this indictment process issued against both of the said defendants, and was served upon them. At the April term of said court, in the year 1820, both of the said defendants appeared and pleaded "not guilty" to the said indictment, on which plea, issue was joined, and a jury was sworn to try the same, which found a verdict of "guilty" against both of the said defendants, and the court rendered a judgment accordingly. To that judgment, the present writ of error was awarded, upon a suggestion, that the said Nancy Hutchins was not indicted for the said offence, because the said indictment did not state in terms that she had intermarried with the said William Tankersly.

"And indeed it would seem at first sight that there was an absence of that certainty and technical precision which the law requires in criminal prosecutions. But when it is recollected that it was impossible that he could have intermarried with her unless she had also intermarried with him, and when upon an examination of the act of assembly it is seen that the offence is, in this respect, laid in the very words of the act, it seems to all the judges that there is all the certainty which reason or the law of the case requires. The judgment is therefore affirmed."

E. H., the sister of the said W. T.,(v) and within the degrees prohibited by an act of the general assembly of Virginia, entitled "An act to regulate the solemnization of marriages, prohibiting such as are incestuous or otherwise unlawful," etc., and that the said W. T. and the said N. H. then and there, from the said, etc., until the taking of this inquisition, did unlawfully, willingly, and incestuously continue to cohabit and live together as man and wife, against, etc. (*Conclude as in book 1, chapter 3.*)

(1001) *Adultery in North Carolina, against both parties jointly.*(x)

That T. C., late of, etc., laborer, and A. W., late, etc., spinster, on, etc., and on divers other days and times both before and after that day, with force and arms, at, etc., unlawfully did bed and cohabit together without being lawfully married, and then and there did commit fornication and adultery,(y) against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1002) *Fornication and bastardy in South Carolina, against the man.*

That A. B., etc., a free white woman, residing in the district of in the state aforesaid, on, etc., at, etc., was delivered of

(v) It would be better to insert here a *scienter*. *Williams v. State*, 2 Carter, 439; Wh. Cr. L. 8th ed. § 1752.

(x) *State v. Cowell*, 4 Iredell, 231. In this case the jury found the defendants guilty of fornication, but not of adultery. On motion to the court on behalf of the state, for judgment against the defendants, the court below, being of opinion that the verdict of the jury amounted to a verdict of acquittal, refused to render the judgment prayed for, and ordered that the defendants go without day.

From this judgment the solicitor for the state prayed for an appeal to the supreme court, which was granted, and in that court the judgment was delivered by Rufin, C. J.: "The court is of opinion that the state is entitled to judgment against the defendants. In ordinary parlance, adultery is an aggravated species of fornication, both involving an illicit cohabitation between the sexes, but the latter is constituted where the parties are single, or at least one of them, while the former imports a violation of the marriage bed. It is true, that the signification of the words, as generally received, would not be material if it were perceived that they were used by the legislature in a peculiar and different sense; for example, as meaning precisely the same thing, instead of different modifications of an offence of the same general nature. But the language of the legislature renders it clear, that those terms are used in the statute according to their common acceptance. The act begins with the words '*the crimes*' (in the plural number) 'of fornication and adultery, etc.,' and concludes by enacting 'that any person convicted of either of the aforesaid offences shall be fined, etc.' An acquittal of one is therefore not necessarily an acquittal of the other; but the parties may be punished for that particular grade of the offence of which the jury finds them guilty."

(y) "Fornication or adultery" is bad. *Maull v. State*, 37 Ala. 160.

a female bastard child, and that the said bastard child is likely to become a burden upon the district of aforesaid. And the jurors aforesaid, upon their oaths aforesaid, do further present, that one C. D. is the father of the said bastard child, and has refused to enter into recognizance, with two good and sufficient sureties, in the penal sum of three hundred dollars, conditioned for the annual payment of twenty-five dollars, for the maintenance of said child, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1003) *Same in Pennsylvania.*

That A. B., late, etc., on, etc., at, etc., and within the jurisdiction of this court, did commit fornication with a certain C. D., and a male bastard child on the body of her the said then and there did beget, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1004) *Same against a woman.*(z)

That M. S., of the county of Philadelphia, spinster, on, etc., at, etc., and within the jurisdiction of this court, did commit fornication with a certain J. L., and did permit the said J. L. then and there to beget a male bastard child on the body of the same M. S., contrary, etc. (*Conclude as in book 1, chapter 3.*)

(z) Mr. Ingraham, of Philadelphia, has furnished me with an indictment for an offence which, though properly falling under conspiracy, may be considered, so far as the act attempted is concerned, under the present chapter. The form, it is said, was sustained after conviction, in Philadelphia, about the year 1700.

"That M. S., C. S., and R. K., etc., being persons of wicked and depraved minds, and wholly lost to a due sense of decency, morality, and religion, on, etc., did, with force and arms, at, etc., unlawfully and immorally, amongst themselves, conspire, combine, confederate, and agree together to bring into contempt the holy estate of matrimony, and the duties enjoined thereby, and to corrupt the morals of his majesty's liege subjects, and to encourage a state of adultery, wickedness, and debauchery; and that they did, according to said conspiracy, etc., on, etc., in and near certain public streets and highways, at, etc., in the presence and view of one J. B., and divers other liege subjects of his majesty, indecently, immorally, unlawfully, wickedly, and wilfully, make and carry into effect and completion a sale of the said M. S. (then and there being the lawful wife of the said C. S.), from him the said C. S. to the said R. K., and with the consent and concurrence of the said M. S., and by such sale the said C. S. disposed of and sold all his marital rights of and concerning the said M. S. (and with her consent and concurrence) to the said R. K., for a certain valuable consideration, to wit, the sum of one shilling and a pot of beer;" etc. (*Conclude as in conspiracy at common law.*)

CHAPTER X.

USURPATION; FORESTALLING; HOLDING ILLEGAL VENDUE; MAINTENANCE; BRIBERY; CORRUPTION AND DOUBLE VOTING AT ELECTIONS; BETTING AT AN ELECTION; EMBRACERY; BETTING AT A HORSE-RACE; RUNNING A HORSE AT A HORSE-RACE; WINNING MONEY AT CARDS, ETC.

USURPATIONS, ETC.

- (1005) Usurpation, under Ohio statute.
- (1006) Another form.

FORESTALLING, ETC.

- (1007) Forestalling.
- (1008) Reqrating.
- (1009) Engrossing.

HOLDING VENDUE WITHOUT AUTHORITY.

- (1010) Against a person for holding a vendue without authority, under the Pennsylvania statute.

MAINTENANCE, ETC.

- (1011) Maintenance.

BRIBERY, ETC.

- (1012) Attempting corruptly to induce a member of the state house of representatives, who was one of the committee of banks, to aid in procuring the recharter of a particular bank, at common law.
- (1013) Endeavoring to bribe a constable.
- (1014) Bribery of a judge of the United States, on the act of April 30, 1790, § 21.
- (1015) Against a justice of the court of common pleas, for accepting a bribe.

CORRUPT INTERFERENCE WITH ELECTIONS.

- (1016) Corrupt interference with an election. First count, offering money to a voter to vote for a particular member of parliament.
- (1017) Second count. Actually giving a bribe.
- (1018) Attempting to influence a voter by threatening to discharge him from employment. Mass. stat. 1852, ch. 321.
- (1019) Illegal voting, under Rev. Sts. ch. 4. First count, Rev. Sts. ch. 4, § 6.

(1020) Voting more than once, under Ohio statute.

(1021) Giving double vote ; misdemeanor at common law.

[*For riot at elections, see ante, 828.*]

EMBRACERY.

(1022) Embracery by persuading a juror to give his verdict in favor of the defendant, and for soliciting the other jurors to do the like.

BETTING, ETC.

(1023) Betting at an election.

(1024) Betting on a horse-race.

(1025) Entering and running a horse at a horse-race.

(1026) Winning money at cards.

(1026*a*) Fraudulently obtaining money by cards, under Illinois statute.

(1027) Same, under English statute.

(1005) *Usurpation under Ohio statute.*

That John Simpson,^(a) on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and forty-nine, at the county of Montgomery so aforesaid, did (*here set out the particular acts of usurpation*), and so the said John Simpson, then and there in manner and form aforesaid, did take upon himself to exercise and officiate in the office of sheriff of said county, without being legally authorized so to exercise and officiate in the said office of sheriff, being then and there an office of authority in the said state of Ohio.^(a') (*Conclude as in book 1, chapter 3.*)

(1006) *Another form.*

That John Simpson, on the twenty-fourth day of September, in the year of our Lord one thousand eight hundred and forty-nine, at the county of Montgomery aforesaid, did (*here set out the particular acts of usurpation*), and so the said John Simpson, then and there in manner and form aforesaid, did take upon himself to exercise and officiate in the place and office of deputy sheriff of said county, without being legally authorized so to exercise

(*a*) Two defendants, occupying different offices, cannot be joined. Wh. Cr. L. 8th ed. § 1839.

(*a'*) Warren's C. L. 299. S. Craighead, pros. att'y. Plea of guilty and sentence. This precedent is copied verbatim from the original indictment, except that no particular acts of usurpation are set forth in the original. The next form is taken from the same indictment. See for offence generally Wh. Cr. L. 8th ed. § 1838*b*.

and officiate, the said place and office of deputy sheriff being then and there a place and office of authority in the said state of Ohio.(b) (*Conclude as in book 1, chapter 3.*)

(1007) *Forestalling.(c)*

That A. O., late of, etc., yeoman, on, etc., at, etc., did buy and cause to be bought of and from one A. S., twenty oxen, for the sum of two hundred pounds, of current money of New York, as he the said A. S. then and there was driving the said twenty oxen to the market of to sell the said twenty oxen in the said market, and before*the said twenty oxen were brought into the said market, where the same should be sold, in contempt of the laws of the said state, to the evil example of all others in like case offending, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1008) *Regrating.(d)*

That A. B., of, etc., on, etc., at, etc., in a certain market there, called the market, unlawfully did buy, obtain, and get into his hands and possession, of and from one C. D., a large quantity of to wit, one hundred pounds weight of at and

(b) See the preceding note. This form and the preceding one are taken from one and the same indictment.

(c) *Offences.*—"Forestalling is the buying or contracting for any species of provision or merchandise in the way to market, dissuading persons from bringing goods thither, or persuading them to enhance the price when there, so that the prices may be raised in the market. 4 Bla. Com. 360. See 3 Inst. 535. *Regrating* is the buying corn or other victual, in any market, and selling it again in the same market, or within four miles of the same market, which has been supposed also, of necessity, to enhance prices. Ib. *Engrossing* is the buying up a large quantity of food, with a view to sell again, so as to engross and control the market. Ib. An old statute (5 & 6 Ed. VI. c. 14) was directed against the supposed offences, which were believed to have a tendency to prevent the public from being supplied with the necessaries of life upon reasonable terms. This statute was repealed by 12 Geo. III. c. 71; yet the courts have still considered forestalling and engrossing offences at common law (R. v. Waddington, 1 East, 143); and as to regrating, the judges were equally divided. R. v. Rushton, Hil. Term, 40 Geo. III. It seems, however, that at the present day, acts of this kind would not be deemed offences unless conducted to an extent manifestly injurious to the public, or accompanied by circumstances manifesting a direct intention to do a public injury. See R. v. Webb and others, 14 East, 406, and Pratt v. Hutchinson, 15 East, 511." Dickinson's Q. S. 380. See Wh. Cr. L. 8th ed. § 1849.

See for other forms, 2 Chit. C. L. 532.

(d) Davis's Prec. p. 124. The quantity must be stated. 1 East, 538; 2 Stark. 654. See Wh. Cr. L. 8th ed. § 1849.

for the price of for each and every pound of the said
and that afterwards, to wit, on, etc., he the said A. B., at, etc.,
in the same market there, unlawfully did regrate the said one
hundred poundsweight of and did then and there sell the
same again to one E. F., at and for the price of for each and
every pound weight of the said with a deduction of
on the whole price of the said one hundred pounds weight of
 being allowed and thrown back by the said A. B. to the
said E. F., against, etc. (*Conclude as in book 1, chapter 3.*)

(1009) *Engrossing.(e)*

That A. B., of, etc., on, etc., at, etc., did unlawfully engross and
get into his hands, by buying of and from divers persons to the
jurors aforesaid unknown, a large quantity, to wit, one thousand
bushels of wheat, with intent to sell the same again for lucre,
gain, and at an unreasonable profit, against, etc. (*Conclude as
in book 1, chapter 3.*)

(1010) *Against a person for holding a vendue without authority,
under the Pennsylvania colonial statute.*

That P. V., late of, etc., on, etc., at, etc., and within the juris-
diction of this court, did expose to sale and sell, and cause to be
exposed and sold, by public vendue and outcry, sundry goods,
wares, and merchandises, of the value of twenty-four pounds fif-
teen shillings and sixpence, the same goods, wares, and mer-
chandises not being in execution and liable to be sold by order
of law, neither taken nor distrained for rent being in arrear, nor
the said P. being an executor or administrator, or selling the
same goods as the goods and chattels of any testator or intes-
tate, nor the said P. V. being about to move, but the same being
his own proper goods, and he remaining and abiding, contrary,
etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1011) *Maintenance.(f)*

That A. O., late, etc., on, etc., with force and arms, at, etc.,
did unjustly and unlawfully maintain and uphold a certain suit,

(e) Davis's Pree. p. 124. Taken by Mr. Davis from 2 Chit. 534. Wh. Cr.
L. 8th ed. § 1849.

(f) Conductor Generalis, 263.

which was then depending in the court of the said people of the said state, before their judges, between A. P., plaintiff, and A. D., defendant, in a plea of debt, on behalf of the said A. P. against the said A. D., contrary to the form of the statute in such case made and provided, and to the manifest hinderance and disturbance of justice, and in contempt of the said people of the said state, and to the great damage of the said A. D., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1012) *Attempting corruptly to induce a member of the state house of representatives, who was one of the committee of banks, to aid in procuring the recharter of a particular bank, at common law.(g)*

That heretofore, to wit, on, etc., at, etc., and within the jurisdiction of this court, E. P. being then and there a member of

(g) *Com. v. McCook*, MSS. This indictment was prosecuted to conviction and sentence, in June, 1846, by Mr. Kane, then attorney-general, and Mr. M'Alister, prosecuting attorney for Dauphin county.

Judge Eldred charged the jury upon the law of the case in the following words:—

“The defendant is indicted for bribery, or for attempting to bribe Victor E. Piolet, a member of the legislature of Pennsylvania.

“The question presented in this case is admitted to be one of great importance, not only as it affects the commonwealth and its citizens, but as it regards the defendant, who it appears has heretofore borne a good character. We feel the responsible position in which we are placed in this cause, for although it may be conceded that the jurors are judges of the law and the facts, we believe it to be the duty of the court, and that we are under equal obligations with the jury to instruct them on the law that should govern the cause, and to aid them in coming to a correct conclusion in relation to the facts, by drawing their attention to that part of the evidence which bears particularly on the question. As to the law, we have no case, so far as we have been informed, where a member of parliament in England has been indicted for bribery, at common law, nor have we any case in this country, where a member of a state legislature has been indicted at common law for that offence; hence it is that we feel a responsibility in disposing of this question, unusual as it is—indeed a new case.

“We find the offence of bribery defined in 4th Black. Com. 139, to be, when a judge, or other person connected with the administration of justice, takes an undue reward to influence his behavior in office. It is punished in inferior offices with fine and imprisonment, *and in those who offer the bribe, the same.* But in judges it hath always been looked upon as so heinous an offence, that Chief Justice Thorpe was hanged for it, in the reign of Edward III. Mr. Russell, a late writer on criminal law, says (2 Russ. 122), ‘bribery is the receiving or offering any undue reward by or to any person whatsoever, whose ordinary business relates to the administration of public justice, in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity.’

“2 Russ. 124.—‘Attempt to commit a misdemeanor, being itself a misde-

the house of representatives of the commonwealth of Pennsylvania, duly elected and qualified, certain petitions and other

meanor, attempts to bribe, though unsuccessful, have in several cases been held to be criminal.'

"One of the objections to a conviction in this case is, that no person who is not in some way connected with, and whose business relates to the administration of justice, as administered through our courts, can be convicted of the offence of bribery, such as judges, justices, sheriffs, etc., and this position the defendant's counsel contend is fully sustained in the above definitions of bribery, and cannot be extended to bribing or an attempt to bribe a member of the legislature. If this position is correct, there is an end to this prosecution. It seems from the ancient definition of this offence, that the person liable on this charge must be one connected with the administration of justice, or one whose ordinary business relates to the administration of *public* justice. But the highest judicial tribunals, both in England and this country, have decided that the offence extends to persons not immediately connected with the administration of justice. It has been decided in England, before our revolution, that the offence of bribery can be committed by *any person in an official situation, who will corruptly use the power or interest of his place for rewards or promises*, as in the case of one who was clerk to the agent for French prisoners of war, and indicted for taking bribes in order to procure the exchange of some of them out of their turn. *R. v. Beale*, cited in *R. v. Gibbs*, 1 East, *R.* 183.

"Bribery at elections for members of parliament was undoubtedly always a crime at common law, and consequently punishable by indictment or information—per Lord Mansfield, in *R. v. Pitt* (3 Burr. 1335, Trinity Tr. 1767, and cited in note to Black. 179); and though an act of parliament was passed fixing certain penalties and punishment for this offence of bribery at elections of members of parliament, still it remained an offence at common law, and as such was liable to indictment.

"It has also been held to be a misdemeanor to attempt to bribe a cabinet minister and a member of the privy council to give the defendant an office in the colonies. *Vaughan's case*, 4 Burr. 2494. This case, the counsel for the defendant insists, supports their views of the question, inasmuch as the office that was selected was one that related to the administration of justice; but it will be noticed that the definition of the offence on which they rely, relates to the person who is liable to conviction, and not to the office or thing solicited or desired.

"Many other cases might be referred to in England on this subject if it were necessary. It is difficult to reconcile these cases with the definition of the offence of bribery as contended for by the defendant's counsel. They rather establish, and clearly so, that in England, bribery was an offence at common law, and is extended to persons *in official stations of great trust and confidence, although their office or business did not relate to the administration of justice in these courts*.

"I know of but one case for bribery tried in this state, and that is the case of the *U. S. v. Worrall*, cited in 2 Dall. 384. It was an indictment at common law, tried in the U. S. court for the Pennsylvania district, before Justices Chase and Peters. Worrall was indicted at common law for attempting to bribe Tench Cox, a commissioner of the revenue of the United States, in 1798. There was no act of congress nor statute of Pennsylvania on this subject at the time, and the defendant was convicted and sentenced under the indictment. Worrall was defended by eminent counsel; he was tried before judges distinguished as lawyers. During this investigation it was not suggested that an attempt to bribe a revenue commissioner was not an offence at common law; nor was objection taken that the revenue commissioner was not an officer whose duties or business related to the administration of justice in our courts, and therefore not liable to indictment for bribery. On the contrary, it seems to be conceded that the offence would be punishable in

papers, signed by divers citizens of this commonwealth, were presented to the said house of representatives, in and by which

our state courts which had common law jurisdiction, but the objection was, that the United States courts had not common law jurisdiction; that it was not given to the United States courts expressly by the constitution, and that which was not expressly given was reserved to the states, and therefore it was that the states had reserved their common law powers, except such as were expressly adopted and defined by an act of congress in pursuance of the 8th section of the 1st article of the constitution of the United States; and of this opinion was Judge Chase.

"Judge Peters was of a different opinion. He observes 'that the power to punish misdemeanors is originally and strictly a common law power, and may be constitutionally used by the United States courts; and whenever an offence aims at the corruption of the public officers, it is an offence against the well-being of the United States.'

"It is not at all material how this difference of opinion between Justices Chase and Peters, in relation to the common law jurisdiction of the United States courts, has since been settled; it cannot affect this question pending in this court.

"If those authorities can be relied on, the ground taken here, that an attempt to bribe a member of the legislature is not an offence, because a member of the legislature is not an officer connected with or concerned in the administration of justice in our courts, is quite too narrow and limited. A member of our legislature certainly has as much to do with, and his ordinary business relates as much to the '*administration of public justice*,' in the language of one of the definitions given, as the clerk to the agent for French prisoners, or as a person who may bribe a voter at an election for members of parliament, or as Worrall, who was charged with attempting to bribe a commissioner of the revenue of the United States.

"But if it were necessary to bring this case within the words used in the definition of bribery, are we not justified in saying that the business of a member of the legislature sometimes 'relates to the administration of public justice'—if not ordinarily so? In the case of *Braddee v. Brownfield* (2 W. & S. 278), Judge Sergeant says, that 'the exercise of a certain sort of superior equity jurisdiction of a remedial character, a kind of mixed power, partly legislative, partly judicial, seems to have been practised by our legislature from time to time, in the shape of special laws.'

"There are cases where the legislative and judicial powers so commingle, that the exercise of a certain kind of judicial authority in the passage of a law, is in accordance with the precedents, and not contrary to received constitutional provisions.

"I have given the subject a careful examination and consideration; it is one of vast importance to the community and to the individual concerned, who it appears has heretofore sustained a good character for honesty, integrity, and morality. The offence charged is one highly injurious to public morals, and strikes at the root of our government. The power to preserve itself is necessary, and I believe concomitant with its existence, and through its law tribunals may punish offences of this nature tending to obstruct and pervert the due administration of its affairs. So far as the peace and quiet and happiness of the people are concerned, it is of much importance that the law-making power should be as free from the imputation of corruption, as the judicial power that administers the laws thus made. The community have as deep an interest in protecting the law-makers from all corrupt and seducing temptations of bribes, as they have the judges who expound the laws.

"I am unwilling, if I had the power, to extend the criminal law one step beyond its known and defined limits, and the argument so earnestly and ingeniously urged by the defendant's counsel, that the offence charged was not indictable, or there would have been some precedent, either in England or this country, found, where there was an indictment against a member of parliament,

said petitions and papers certain charges and allegations were made touching the conduct and management of a certain bank,

or member of the legislature, has received due consideration, and although precedents and similar cases are as stars to light our way, in examining questions of this kind, we must not, in looking for them, lose sight of general principles, nor give up the principle because we cannot find a precedent.

"That bribery was an offence at common law, there can be no question in my mind, although one of the counsel for the defendant, if I understood him, contended that it was not so at the adoption of our constitution, and therefore the offence could not be punished except in those cases where provision has been made by statute. In this he is certainly mistaken. We have no statutes in Pennsylvania in relation to bribery, except at elections, and bribery of jurors. It will hardly be seriously contended that a judge or magistrate, sheriff or constable, could not be indicted for bribery, although there is no statute declaring it to be an offence; they could be indicted at common law.

"It has always been held in England, before the revolution, and by the judicial decisions of this country since, that the first settlers brought hither so much of the common law as was applicable to their local situation and condition, and by constant usage have adopted such portions of the common law of England as tended to promote their welfare and happiness. This much of the common law, it is said, they claimed as their birthright; and this was the opinion of Judge Chase in the case of *U. S. v. Worrall*.

"Whilst our legislature recognized the common law of England so far as it applied to our local situation, they found it necessary, from the difficulty in carrying out the rules of the common law, or from the inadequacy of the penalties, or because they were too severe, to make salutary regulations in relation to crimes and misdemeanors in particular cases, and this has been done without interfering with the common law remedy; and almost every day's observation shows, that persons are indicted at common law, when there is a remedy provided by statute, and also persons indicted for common law offences when we have no statute on the subject; and it seems to be well settled in Pennsylvania that whatever amounts to a *public wrong* may be the subject of indictment.

"I am of the opinion that any person who may corruptly offer a bribe to a member of the legislature in order to influence his behavior in office, and incline him to act contrary to the known rules of honesty and integrity, is indictable at common law in our courts in Pennsylvania.

"Having thus disposed of the law of the case, we have but little to say in relation to the facts, which more exclusively belong to the consideration of the jury. If from the evidence you are satisfied that the defendant corruptly offered a sum of money to V. E. Piollet, in order to influence his behavior while acting in the capacity of a member of the legislature, and incline him to act contrary to the known rules of honesty and integrity, the commonwealth's counsel have made out their case against the defendant.

"This case has been ably prosecuted, and defended with great skill and talent; and this consideration relieves the court from the necessity of referring particularly to the evidence, as it has been presented to the view of the jury by the counsel on both sides, in the light most favorable to the respective parties. Under this consideration, it is proper, perhaps, to say that with the motives of Mr. Piollet in bringing on this exposure, and the means resorted to by him to do so, we have nothing to do; we neither indorse his course nor condemn it. It is in no way material in this cause, further than as it may affect his testimony in the minds of the jury. It is but justice to him, however, to observe, that it appears from the evidence that Mr. Piollet at every stage of his proceedings consulted his friends and acted under their advice. It is the intent and motive of the defendant in this cause that is material; whether his motives were corrupt,

to wit, the Lehigh County Bank, being a banking corporation within said commonwealth, incorporated by and in pursuance of the laws thereof, and thereupon it was by the said house of representatives committed and referred to him the said E. P., and others, also members of the said house of representatives, to inquire into the truth of the charges and allegations so made, and to report thereon to the said house of representatives, whereby it became and was the duty of the said E. P., in his capacity and character of a member of the house of representatives of the commonwealth of Pennsylvania, to inquire into the truth of the said charges and allegations, and to report thereon to the said house of representatives as to truth and justice might appertain; and the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that D. M'C., late of, etc., at, etc., and within the jurisdiction of this court, well knowing the premises, but unlawfully, wickedly, and corruptly devising, contriving, and intending to tempt, seduce, bribe, and corrupt the said E. P., so being a member of the house of representatives of this commonwealth, duly elected and qualified, and as such engaged in inquiring into the truth of the said charges and allegations, and about to report thereon as aforesaid, to prostitute, abuse, and betray his trust, and violate his duty as a member of the said house of representatives, towards the good people of this commonwealth, he the said D. M'C., on, etc., at, etc., and within the jurisdiction of this court, with force and arms, did wickedly and corruptly offer and give to the said E. P. a large sum of money, to wit, the sum of four hundred dollars, in order thereby corruptly to influence, induce, persuade, and bribe him the said E. P., in his capacity and character of a member of the house of representatives of this commonwealth, to vote for, agree to, and make a report in regard to the charges and allegations, so to him with others by the

whether he corruptly offered the money, as testified to, for the purpose of influencing the action of Mr. Piollet contrary to his duty as a member of the legislature, is the main question in the cause.

By the act of March 3, 1847, Pamph. p. 217, passed on the heels of the above case, the bribery of any public officer is made a felony. In all cases covered by the act, the common law remedy, so far as Pennsylvania is concerned, is consequently abrogated. See as to offence generally, Wh. Cr. L. 8th ed. § 1857.

In *Com. v. Petroff*, 2 Pearson (Penn.) 534, it was held that a direct offer to bribe was not necessary to constitute the offence.

said house of representatives committed and referred as aforesaid, which report should be in favor of the Lehigh County Bank, and against the truth of the said charges and allegations; to the great dishonor of the said E. P., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

That the said D. M'C., yeoman, on, etc., at, etc., and within the jurisdiction of this court, wickedly, advisedly, and corruptly did solicit, urge, and endeavor to procure the said E. P., he the said E. P. then and there being a member of the house of representatives of the commonwealth of Pennsylvania, and a member of the said committee on banks, and then and there engaged in the discharge of his said duties as aforesaid, in inquiring into the truth of the said charges and allegations, touching the conduct and management of the said Lehigh County Bank, to vote for, agree to, and make a report in said committee, and as a member of said committee, and in his character and capacity of a member of the house of representatives of the commonwealth of Pennsylvania, which report should be in favor of the said Lehigh County Bank, and adverse to the said charges and allegations; and in order corruptly to induce, influence, persuade, and bribe him the said E. P. to vote for, agree to, and make a report as aforesaid, he the said D. M'C., then and there well knowing the premises, did wickedly, advisedly, and corruptly offer and give to the said E. P. a large sum of money, to wit, the sum of four hundred dollars; and the inquest aforesaid, upon their oaths and affirmations aforesaid, do further present, that the said D. M'C., with like corrupt intent as aforesaid, then and there did wickedly, advisedly, and corruptly offer and promise to pay to the said E. P., so as aforesaid being a member of the said house of representatives, and a member of the said committee, and while engaged in his said duties as aforesaid, one hundred dollars in addition to the four hundred dollars offered and paid as aforesaid, when the report of the said committee on banks should be made (meaning when the report of the said committee, touching the conduct and management of the said Lehigh County Bank, should be made and presented to the said house of representatives, which report should be in favor of the said bank, and adverse to the said charges and allegations); to the

great dishonor of the said E. P., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1013) *Endeavoring to bribe a constable.*(*h*)

That heretofore, to wit, on, etc., at, etc., one A. B., Esq., then and yet being one of the justices of the peace in and for the county of duly qualified, appointed, and sworn to discharge and perform the duties of said office, did then and there make and issue a certain warrant under his hand and seal, in due form of law, bearing date the day and year aforesaid, directed to any of the constables of the town of in the county aforesaid, thereby commanding them, upon sight thereof, to take and bring before him the said A. B., so being such justice as aforesaid (*or some other justice of the peace for the said county, if such be the warrant*), the body of one C. D., late, etc., to answer (*as in the warrant*); and which said warrant afterwards, to wit, on, etc., at, etc., was delivered to E. F., of, etc., he the said E. F. then being one of the constables of the said town of aforesaid, duly appointed and qualified to discharge the duties of said office of constable, to be executed in due form of law. And the jurors aforesaid, upon their oath aforesaid, do further present, that G. H., late of, etc., well knowing the premises, but contriving and unlawfully intending to pervert the due course of law and justice, and to prevent the said C. D. from being arrested and taken under and by virtue of the warrant aforesaid, afterwards, to wit, on the day and year aforesaid, at, etc., unlawfully, wickedly, and corruptly did offer unto the said E. F., so being constable as aforesaid, and having in his custody and possession the said warrant so delivered to him to be executed as aforesaid, the sum of dollars, if he the said E. F. would refrain from executing the said warrant, and from taking and arresting the said C. D. under and by virtue of the same warrant, for and during fourteen days from that time, that is to say, from the time he the said G. H. so offered the said sum of to the said E. F. as aforesaid; and so the jurors aforesaid, upon their oath aforesaid, do say, that the said G. H., in manner and form aforesaid, did attempt and endeavor to bribe the said E. F., so being constable as aforesaid,

(*h*) Davis's Prec. 78; Arch. C. P. 322.

to neglect and omit to do his duty as such constable, and to refrain from taking and arresting the said C. D. under and by virtue of the warrant aforesaid; against, etc. (*Conclude as in book 1, chapter 3.*)

(1014) *Bribery of a judge of the United States, on the act of April 30, 1790, § 21.(i)*

That A. B., of, etc., on, etc., at, etc., within the district aforesaid, did give to one C. D., of, etc., he the said C. D. being then and there a judge of (*here insert the style of the court*), duly and legally appointed and qualified to discharge the duties of that office, the sum of dollars as a bribe, present, and reward, to obtain and procure the opinion, judgment, and decree of him the said C. D. in a certain suit (*controversy or cause*), then and there depending before him the said C. D., as judge as aforesaid of the said court, to wit (*here state the nature of the suit*); the said office of judge of the said court being then and there an office and trust concerning the administration of justice within the said United States; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1015) *Against a justice of the court of common pleas for accepting a bribe.(j)*

That A. B., of, etc, esquire, on, etc., at, etc., in the county aforesaid, was one of the justices of the court of common pleas, etc. (*here state the style of the court*), duly and legally appointed, qualified, and sworn to discharge and perform the duties of that office; the same being an office of importance and trust concerning the administration of justice within this commonwealth; and that the said A. B., being then and there such justice of said court of common pleas as aforesaid, contriving and intending the duties of his said office, and the trust and confidence thereby reposed in him, to prostitute and betray, did then and there unlawfully and corruptly accept and receive of one C. D. the sum of dollars, as a bribe and pecuniary reward, to influence and induce him the said A. B. to (*here state the facts*

(i) Davis's Prec. 79.

(j) Davis's Prec. 75; 4 Bla. Com. 139; 3 Inst. 147; R. v. Vaughan, 4 Burr. 2500; Chit. C. L. 681.

relative to the subject matters of the bribe); and that he the said A. B. did thereby unlawfully, wilfully, and corruptly prostitute, violate, and betray, for the bribe and pecuniary reward aforesaid, so as aforesaid by him the said A. B. in his said office taken, accepted, and received, the duties of his office, and the trust and confidence in him therein and thereby reposed; to the great scandal, dishonor, and prostitution of the public justice of said commonwealth, and against, etc. (*Conclude as in book 1, chapter 3.*)

(1016) *Corrupt interference with an election. First count, offering money to a voter to vote for a particular member of parliament.*(k)

[*For riot at election, see supra, 858, 859, 860, etc.*]

That before and at the time of the committing of the offences hereinafter mentioned, to wit, on, etc., the borough of was and still is a borough electing, sending, and returning two members to serve for said borough in the parliament of the united kingdom of Great Britain and Ireland, to wit, at aforesaid, in the county aforesaid; and, etc., that before the committing the several offences hereinafter mentioned, to wit, on, etc., at, etc., an election of a member to serve in the parliament of, etc., as one of the members of the said borough of was expected shortly to be had and made, which said expected election afterwards, to wit, on, etc., at, etc., was had and made; and, etc., that S. L., late, etc., harness maker, unlawfully, wickedly, and corruptly intending to hinder and prevent the free and indifferent election of a member to serve in the parliament, etc., for the said borough of

and by illegal and corrupt means to procure J. H. S., Esq., commonly called the Hon. J. H. S. (who before and at the time of the said election was a candidate to represent the said borough of in the said parliament), to be elected a member to serve in the said parliament, etc., for the said borough of did on, etc., in, etc., unlawfully, wickedly, and corruptly promise to one G. S. (he the said G. S. then and there, and before and at the time of the said expected election, claiming a right to vote at the election of a member or members, as the case might be, to serve in the said parliament, etc., for the said borough of) a

large sum of money, to wit, the sum of nine pounds, as a gift, bribe, and reward to him the said G. S., to engage, corrupt, and procure the said G. S. to give his vote at the said expected election of a member to serve in the said parliament for the said borough of for the said J. H. S., so being such candidate as aforesaid, that the said J. H. S. might be elected at the said election to serve in the said parliament for the said borough of and thereupon, afterwards, to wit, on, etc., at, etc., the said S. L. did, in pursuance and fulfilment of the said promise, unlawfully, wickedly, and corruptly give, and cause and procure to be given, to the said G. S., a large sum of money, to wit, the said sum of nine pounds, as a gift, bribe, and reward to the said G. S., in order and with intent to induce, procure, and corrupt the said G. S., by means of the said gift, bribe, and reward, to give his vote for the said J. H. S. at the said expected election of a member to serve in the said parliament for the said borough of that he the said J. H. S. might be chosen and returned at the said election to serve in the said parliament for the said borough; to the great obstruction and hinderance of the freedom of election of a member to serve in the said parliament for the said borough, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1017) *Second count. Actually giving a bribe.*

That the said S. L., further unlawfully, wickedly, and corruptly contriving and intending as aforesaid, did afterwards, to wit, on, etc., last said, at, etc., the said election being then and there so expected as in the first count of this information mentioned, unlawfully, wickedly, and corruptly give, and cause and procure to be given, to the said G. S. (he the said G. S. then and there, and before and at the time of the said first count mentioned, claiming a right to vote at the election of a member or members, as the case might be, to serve in the parliament, etc., for the said borough of) a large sum of money, to wit, the sum of nine pounds, as a gift, bribe, and reward to him to engage, corrupt, and procure the said G. S. to give his vote at the said expected election of a member to serve in the said parliament for the said borough, for the said J. H. S., who was then and there, and before and at the time of the said election so then expected as

aforesaid, a candidate to represent the said borough in the said parliament, etc., that he, the said J. H. S., might be chosen and returned to serve in the said parliament for the said borough, to the great obstruction and hinderance of the freedom of the said expected election of a member of parliament for the said borough, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1018) *Attempting to influence a voter by threatening to discharge him from employment. Mass. stat. 1852, ch. 321.*

That on the first day of June, in the year of our Lord at B., in the county of S., a town meeting of the inhabitants of said B., in the county aforesaid, for the election of governor and lieutenant-governor of the commonwealth aforesaid, and senators for the district of S., was then and there duly holden. And the jurors aforesaid, upon their oath aforesaid, do further present, that one J. N., the said J. N. being then and there a qualified voter in this commonwealth, to wit, at B. aforesaid, in the county aforesaid, was then and there in the employment of one C. D., late of B. aforesaid, in the county aforesaid, gentleman. And the jurors aforesaid, upon their oath aforesaid, do further present, that the said C. D. did then and there, at the said election, unlawfully attempt to influence the said J. N., so being a qualified voter in this commonwealth as aforesaid, to give his the said J. N.'s ballot in said election, then and there duly holden, by then and there threatening to discharge the said J. N. from the said C. D.'s employment; against the peace, etc., and contrary to the form of the statute, etc.

(1019) *Illegal voting under Rev. Sts. ch. 4. First count, Rev. Sts. ch. 4, § 6.(l)*

That A. C., etc., on, etc., at, etc., at a town meeting of the inhabitants of said T., at the election of governor and lieutenant-governor of said commonwealth, and of senators for the district

(l) No technical exceptions were taken to either of these counts in *Com. v. Shaw*, 7 Mete. 52. Wh. Cr. L. 8th ed. §§ 1836, 1837. A new trial was granted, however, with the understanding that if the attorney-general should enter a *nolle prosequi* on the second count, judgment should be entered on the first, it appearing that one of the allegations in the second count was not sustained by the evidence.

of Middlesex in said commonwealth, then and there duly holden, well knowing himself not to be a qualified voter, did wilfully give in a vote for the officers aforesaid, being the officers to be chosen; against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That, etc., on, etc., at, etc., at another town meeting of the inhabitants of said T, at the election of governor and lieutenant-governor of said commonwealth, and for senators for the district of Middlesex, being then and there inquired of by the selectmen of T., presiding at said meeting and election, whether he the said defendant had paid any tax within any town or district in this state, to wit, the commonwealth aforesaid, did then and there wilfully give a false answer to said selectmen, namely, that he the said defendant had paid a tax assessed upon him in the city of Lowell, in said county, within two years next preceding said election, to wit, a tax assessed to him in said Lowell in the year eighteen hundred and forty; whereas, in truth and fact, said defendant had not paid any such tax so assessed upon him in said Lowell in the year eighteen hundred and forty; and the said inquiry was then and there made of said defendant for the purpose of ascertaining his right to vote at said election, and said false answers were returned by him, he said defendant then and there fraudulently intending to procure his name to be inserted on the voters' list of said town, and to obtain permission then and there to vote at said election, against, etc. (*Conclude as in book 1, chapter 3.*)

(1020) *Voting more than once under Ohio statute.(m)*

That on the third day of April, in the year of our Lord one thousand eight hundred and forty-three, at the township of Cleveland, in the county aforesaid (the same being the first Monday of the month of April in said year), the annual election for township officers of said township, to wit, the election of one justice of the peace, three trustees, two overseers of the poor, one treasurer, four constables, one township clerk, one township assessor, one supervisor of highways for each of the eight road

districts in said township, and three fence viewers, was duly held in said township, at the places following, to wit: at the court-house in the city of Cleveland, in said township, being in the first ward in said city, the said first ward then and there constituting one election district in said township; at the brick school-house on Rockwell street, in the second ward in said city, the said second ward in said city and that portion of said township lying without the boundaries of said city, then and there constituting another election district in said township; and at the academy on St. Clair street, in the third ward in said city, said third ward then and there constituting another election district in the said township; and the aforesaid further says, that at the election aforesaid, at the time aforesaid, at the polls then and there held at the court-house as aforesaid, R. B., F. S., and B. W. then and there acted as judges of said election, and A. R. and W. S. then and there acted as clerks of the justices' poll of said election, and G. L. and H. A. then and there acted as clerks of the township officers' poll of said election; at the polls then and there held at the brick school-house as aforesaid, G. B., S. C., and E. L. then and there acted as judges of said election, and J. F. and W. S. then and there acted as clerks of the justices' poll of said election, and F. S. and D. W. then and there acted as clerks of the township officers' poll at said election; and at the polls then and there held at the academy as aforesaid, J. A., S. C., and E. R. then and there acted as judges of said election, and A. P. and M. R. then and there acted as clerks of the justices' polls of said election, and J. F. and J. C. then and there acted as clerks of the township officers' poll of said election; and the aforesaid further says, that one A. B., late of, etc., yeoman, on the said third day of April, in the year of our Lord one thousand eight hundred and forty-three, in the county of Cuyahoga aforesaid, did vote once by ballot at said election at the polls so held at said court-house, in said first ward as aforesaid, and afterwards, to wit, on the day last aforesaid, at the township aforesaid, the said A. B. did vote a second time by ballot at the election aforesaid, to wit, at the polls so held in the brick school-house on Rockwell street, in the second ward in said city, as aforesaid, and so the aforesaid, upon oath aforesaid, do say, that the said A. B., on

the said third day of April, in the year aforesaid, at the township aforesaid, in the county aforesaid, unlawfully and knowingly did vote more than once, at the election aforesaid, so held as aforesaid, for the election of the township officers aforesaid. (*Conclude as in book 1, chapter 3.*)

(1021) *Giving double vote; misdemeanor at common law.(n)*

That of the county aforesaid, on, etc., at, etc., being admitted as a legal voter at the town meeting holden on the day and year aforesaid, at Salem in the said commonwealth, for the choice of town officers, did then and there wilfully, fraudulently, knowingly, and designedly give in more than one vote for the choice of selectmen for said town of Salem at one time of balloting, to the great destruction of the freedom of elections, to the great prejudice of the rights of the other qualified voters in said town of Salem, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1022) *Embracery by persuading a juror to give his verdict in favor of the defendant, and for soliciting the other jurors to do the like.(o)*

That A. B., of, etc., on, etc., at, etc., knowing that a certain

(n) This count, which in *Com. v. Silsbee*, 9 Mass. 417, was held sufficiently to set forth an offence at common law, is in several respects inartificially drawn. Perhaps it would have been better to have charged specifically that the defendant gave two votes, or three votes, instead of saying generally that he gave more than one. It is not straining a great deal to imagine a case in which "more than one" does not amount to two. The conclusion, "and the law of the same," etc., was meant, as appears from the argument, to refer to the common law, and not to any particular statute, and if so, it is superfluous. As a statutory conclusion, on the other hand, it is untechnical and insufficient. *Com. v. Stockbridge*, 11 Mass. 279. These defects, however, may be considered as mere surplusage, and not only is the offence set forth with substantial accuracy, but the validity of the indictment itself as a precedent has been settled by the supreme court. In those states, however, where double voting is punishable by statute, the common law may be considered as merged in the statutory provision.

(o) Davis's Prec. 113. "This precedent is taken," says Mr. Davis, "in substance, from a similar precedent in Trem. P. C. 176, and is the only one to be met with either in that collection or in Coke's Entries, Chit. C. L., Stark. C. P., Cro. C. C., or Cro. C. A. There are two other precedents in an ancient book containing precedents of indictments, informations, etc., entitled 'Officium Clerici Pacis.'

"The last allegation in this precedent, namely, that the jury gave their verdict for defendant by reason of the solicitations, etc., is not necessary. The crime is complete by the attempt, whether it succeed or not. Hawk. b. 1, c. 85, s. 1, 2, and the authorities there quoted."

jury of the said county of B. was then duly returned, empanelled, and sworn to try a certain issue joined in the supreme judicial court then held and in session according to law, at B. aforesaid, in and for the said county of B., between C. D. plaintiff, and E. F. defendant, in a plea of the case; and then also knowing that a trial was to be had upon the said issue, on, etc., before the said supreme judicial court then and there held for the said county of B., he the said A. B., wickedly and unlawfully intending and devising to hinder a just and lawful trial of the said issue by the jurors aforesaid returned, empanelled, and sworn as aforesaid to try the said issue, on, etc., at, etc., unlawfully, wicke.lly, and unjustly, on behalf of the said E. F., the defendant in the said cause, did solicit and persuade one G. H., one of the jurors of the said jury returned, empanelled, and sworn according to law for the trial of said issue, to appear and attend in favor of the said E. F., the said defendant in the said cause, and then and there did utter to the said G. H., one of the jurors as aforesaid, divers words and discourses by way of commendation, on behalf of him the said E. F., the said defendant, and in disparagement of the said C. D., the plaintiff; and that he the said A. B. did then and there unlawfully and corruptly move and desire the said G. H. to solicit and persuade the other jurors returned, empanelled, and sworn to try the said issue, to give a verdict for the said E. F., the defendant in the said cause, he the said A. B. then and there well knowing that the said G. H. was one of the jurors returned, empanelled, and sworn to try the said issue; and that the jurors of said jury, by reason of speaking and uttering the words and discourses aforesaid, did then and there, to wit, etc., give their verdict for the said E. F., the said defendant in the cause aforesaid; against, etc. (*Conclude as in book 1, chapter 3.*)

(1023) *Betting at an election.*(p)

That D. S., late, etc., on, etc., at, etc., and within the jurisdiction of this court, did lay a wager and bet with a certain J. C.,

(p) *Sherban v. Com.*, 8 Watts, 213. The objection to this indictment was that it did not state positively that there was an election pending. "We think the fair implication is," said Sergeant, J., "not only that such bet was made, but that the election was to be held at that time."

and that the said D. S. did then and there lay a wager and bet of fifty dollars with the said J. C., that a certain J. R. would be elected governor of the commonwealth of Pennsylvania, at an election to be held in said commonwealth under the constitution and laws of said commonwealth, on, etc., the said J. R. then and there being a candidate nominated for public office, to wit, for the office of governor of said commonwealth; contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1024) *Betting at a horse-race.(q)*

That B. H. P., late, etc., heretofore, to wit, on, etc., at, etc., unlawfully did bet two dollars with a person to the jurors unknown, upon a horse-race, which said horse-race was not run upon a path or track made or kept for the purpose of horse-racing. And the jurors aforesaid, upon their oaths aforesaid, do further present, that B. H. P., late of the said county, on, etc., at, etc., did bet and wager bank notes, being valuable things, with a person to the jurors unknown, upon said horse-race, which said horse-race was not run upon a track or path made or kept for the purpose of turf-racing, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(q) This count was sustained in *State v. Posey*, 1 Humph. 301. "The act of 1820, ch. 5," said the court, "exempts turf-racing from the penalties inflicted by the statutes against gaming. Match races for short distances not being regarded by sportsmen as turf-racing, the exemption in this act was not considered as extending to such races. The act of 1833, ch. 10 (Comp. Stat. 360), explanatory of the act of 1820, ch. 5, declares that all horse-racing, without regard to the distance which may be run, where the same is run upon a track or path made or kept for the purpose of horse-racing, shall be deemed turf-racing, within the meaning of the acts of assembly of this state. This latter act evidently intended to change the law as it stood only as it regards the distance which may be run. It excepts only a quarter of a mile turf-racing, but it does not exempt them from the penalties of the acts against gaming, unless they be run upon a track or path made or kept for the purpose of horse-racing. The indictment in this case alleges that the race was not run on a track made and kept for horse-racing; it is therefore not within the exemption of the act of 1833, and consequently is indictable as though the act had not passed. The legislature never intended to tolerate horse-races gotten up and run at distilleries, grog-shops, and musters, where crowds of excited, intoxicated persons would render it alike dangerous and demoralizing. Indeed the policy of the exemption of horse-racing from the penalties of the statutes against gaming, may in all cases be regarded as questionable; and it is the duty of the courts to construe these statutes so as to suppress the mischief of gaming, and consequently to exempt such only as fall within the express provisions of the law."

(1025) *Entering and running a horse at a horse-race.*(r)

That H. H., late of, etc., yeoman, little regarding the laws and acts of assembly of this commonwealth, and not fearing the pains and penalties therein contained, on, etc., with force and arms, at, etc., and within the jurisdiction of this court, unlawfully did enter, start, and run for the sum of four thousand dollars, at a certain horse-race, etc., a certain horse to him the said H. H. belonging, and did then and there lay, bet, and wager the sum of four thousand dollars upon his horse so entered, started, and run as aforesaid, to the evil example, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1026) *Winning money at cards.*(s)

That H. H. and B. L., being persons of evil name and fame and dishonest conversation, and not caring to get their livelihood by honest labor, but by fraud and deceit maintaining their idle course of life, on, etc., at, etc., and within the jurisdiction of this court, at an unlawful game, artifice, and practice at cards, and by laying wagers with one B. C., relating to the playing of cards, did fraudulently and deceitfully, by means of win, obtain, and get to themselves of and from the said B. C., twenty dollars, of the goods and chattels of the said B. C., and him the said B. C., of his goods and chattels aforesaid, then and there fraudulently and deceitfully, in manner and form aforesaid, did deceive and defraud, to his great damage, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1026a) *Fraudulently obtaining money by cards, under Illinois statute.*

That I. S., late, etc., on, etc., at, etc., by a certain game or device by the use of cards, did unlawfully, feloniously, and fraudulently obtain of J. A. thirty four-dollar bank bills, current money of the dominion of Canada, of value of four dollars each, thirty four-dollar bank notes, current money of Canada, of value of four dollars each, thirty four-dollar bank notes of the Mer-

(r) Drawn by William Bradford, Esq., the then attorney-general of Pennsylvania.

(s) Drawn by Mr. Bradford.

chants' Bank of Canada, valued at four dollars each, current money in dominion of Canada, five-dollar current bank notes of Canada money, of value of five dollars each, one ten-dollar current bank bill, Canada money, of value ten dollars, one hundred and twenty dollars in bank notes and current bank bills of the current money of the dominion of Canada, of divers issues and denominations to the grand jurors unknown, of value of one hundred and thirty dollars, the property of said A., contrary, etc. (*Conclude as in book 1, chapter 3.*)

[The second count charged that I. S., etc., on, etc., at, etc., by a certain game, device, and trick, by the use of cards and other implements, did then and there unlawfully, feloniously, and fraudulently obtain of and from the said J. A. the moneys and personal property aforesaid, of the value aforesaid, of the money and personal property of the said J. A., contrary to the statute, etc.

The third count charged that the defendant, on, etc., at, etc., "by a certain game, device, sleight-of hand, and trick, by the use of cards and other implements and instruments, the names and descriptions of which are to the grand jurors aforesaid unknown, did then and there unlawfully, feloniously, and fraudulently obtain of and from the said J. A. the money and personal property aforesaid, of the value aforesaid, the money and personal property of the said J. A., contrary," etc.(t)] -

(1027) *Same under English statute.*

That I. S. on, etc., by fraud, unlawful device, and ill practice in playing at and with cards, unlawfully did win from one H. F. B., to a certain person whose name is to the jurors unknown, a sum of money, to wit, fifty pounds of the money of the said H. F. B. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said I. S., then in manner and form aforesaid, unlawfully did obtain the said sum of money, to wit, fifty pounds, so being of the moneys of the said H. F. B. as aforesaid, from the said H. F. B. by a false pretence, with intent to cheat and defraud the said H. F. B. of the said sum of money, to wit, fifty pounds, against, etc.

(t) Sustained in *Blemer v. People*, 76 Ill. 265.

Second count.

That the said I. S. afterwards, to wit, etc., by fraud, unlawful device, and ill practice in playing at cards, unlawfully did win from the said H. F. B., to a certain person whose name is to the jurors unknown (*or* to himself the said I. S.), a certain sum of money, to wit, etc., with intent to cheat him the said H. F. B., to the evil example, etc., against, etc.(*u*)

(*u*) This, with slight changes, is taken from Arch. C. P. 19th ed. p. 989. The second count was sustained in *R. v. Moss*, D. & B. 104. A count may be added for conspiracy to cheat. *R. v. Hudson*, Bell, 263.

CHAPTER XI.

CHALLENGING TO FIGHT.(a)

- (1028) Sending a challenge, at common law. First count, sending the letter containing the challenge.
- (1029) Second count. Provoking another to fight a duel.
- (1030) Provoking a man to send a challenge.
- (1031) Writing and delivering a challenge at the instance of a third person.
- (1032) Second count. For delivering a written challenge as from and on the part and by the desire of E. F.
- (1033) Third count. For provoking and inciting the prosecutor to fight.
- (1034) For a verbal challenge.
- (1035) Giving a challenge in the presence of a justice of the peace.
- (1036) For sending a challenge, in Pennsylvania.
- (1037) Accepting a challenge.
- (1038) Engaging in a duel, under Ohio statute.
- (1039) Being second in a duel, under Ohio statute.
- (1040) Against a second for carrying a challenge, under the South Carolina statute.
- (1041) Second count. Omitting to set out letter.
- (1042) For being a second in a duel.
- (1043) Sending a written message to a person to fight a duel. Rev. Sts. of Mass. ch. 125, § 6.
- (1044) Posting another for not fighting a duel. Rev. Sts. of Mass. ch. 125, § 8.
- (1045) Challenging and posting, at common law.

(1028) *Sending a challenge, at common law. First count, sending the letter containing the challenge.*(b)

That J. S., late, etc., gentleman, being a person of turbulent and quarrelsome temper and disposition, and contriving and intending not only to vex, injure, and disquiet one J. N. and do the said J. N. some grievous bodily harm, but also to provoke, instigate, and excite the said J. N. to break the peace, and to fight a

(a) See Wh. Cr. L. 8th ed. § 1768.

(b) Arch. C. P. 5th Am. ed. 714.

duel with and against him the said J. S., on, etc., at, etc., wickedly, wilfully, and maliciously did write, send, and deliver, and cause and procure to be written, sent, and delivered unto him, the said J. N., a certain letter and paper writing containing a challenge to fight a duel with and against him the said J. S., and which said letter and paper writing is as follows, that is to say (*here set out the letter with such innuendoes as may be necessary*),^(c) to the great damage, scandal, and disgrace of the said J. N., in contempt of our lady the queen, and against, etc. (*Conclude as in book 1, chapter 3.*)

(1029) *Second count. Provoking another to fight a duel.*

That the said J. S., contriving and intending as aforesaid, afterwards, to wit, on, etc., with force and arms, at, etc.,* wickedly and maliciously did provoke, instigate, excite, and challenge the said J. N. to fight a duel with and against him the said J. S., to the great damage, scandal, and disgrace of the said J. N., in contempt, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1030) *Provoking a man to send a challenge.*^(d)

(*Proceed as in the last precedent to the * and then thus*): wickedly, wilfully, and maliciously did utter, pronounce, declare, and say to and in the presence and hearing of the said J. N. these words following, that is to say, "You are a scoundrel and a liar, and I shall take care to let the world know that you are so," with intent to instigate, excite, and provoke the said J. N. to

^(c) A written letter, if merely the inducement or introduction to an oral communication, conveying a challenge, need not be set forth. Thus, where T., in a letter to N., used expressions implying a challenge, and by a postscript referred N., the challenged party, to one H. (the bearer of the letter), if any further arrangements were necessary, it was held that the letter was only evidence of the challenge, and need not be specially pleaded; and that N. might give testimony of the conversation between H., the bearer of the letter, and himself. *State v. Taylor*, 3 Brev. 243. Even when a statute makes sending a challenge indictable, it has been held not necessary to set out a copy of the challenge. *Brown v. Com.*, 2 Va. Cas. 516; *State v. Farrier*, 1 Hawks, 487. And if an attempt be made to set out in the indictment a copy, and it varies slightly from the original, as by the addition or omission of a letter, no way altering the meaning, this is cured by verdict. See *Heffren v. Com.*, 4 Mete. (Ky.) 5; *Ivey v. State*, 12 Ala. 276. The substance is enough to set forth. *Ivey v. State*, 12 Ala. 276; see *Com. v. Tibbs*, 1 Dana, 524.

^(d) Arch. C. P. 5th Am. ed. 715.

challenge him the said J. S. to fight a duel with and against him the said J. N., to the great damage, etc. (*as in the last precedent but one*). (*If there be any doubt as to the words, lay them differently in different counts, and add a general count, not setting out the words, but merely charging the defendant with having used threats and opprobrious language to the prosecutor, with intent, etc.*)

(1031) *Writing and delivering a challenge at the instance of a third person.*(e)

That A. B., late of, etc., esquire, on, etc., at, etc., being of a turbulent, wicked, and malicious disposition, and intending to procure great bodily harm and mischief to be done to C. D., late of, etc., in the county aforesaid, esquire, and also intending, as much as in him the said A. B. lay, to incite and provoke the said C. D. unlawfully to fight a duel with and against one E. F., late, etc., on, etc., with force and arms, at, etc., did unlawfully, wickedly, and maliciously write, and cause to be written, a certain paper writing, in the words, letters, and figures following, to wit (*here set out the paper writing with the proper innuendoes*), which said paper writing (meaning and intending the same as such challenge as aforesaid), he, the said A. B., afterwards, to wit, on, etc., at, etc., unlawfully, wickedly, and maliciously, did deliver, and cause to be delivered, to the said C. D., against, etc. (*Conclude as in book 1, chapter 3.*)

(1032) *Second count. For delivering a written challenge as from and on the part and by the desire of E. F.*(f)

That the said A. B., being such evil disposed person and disturber of the peace of our said lord the king, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D., and to incite and provoke him the said C. D., unlawfully to fight a duel with and against the said E. F., afterwards, to wit, on, etc., with force and arms, at, etc., did unlawfully, wickedly, and maliciously deliver, and cause to be delivered, a certain written challenge as from and on the part and by the desire of the said E. F., to the said C. D., unlawfully to

(e) 2 Stark. on Slander, 361. That this is indictable at common law, see Wh. Cr. L. 8th ed. § 1773.

(f) 2 Stark. on Slander, 362.

fight a duel with and against the said E. F., which said last mentioned challenge is as follows, that is to say (*set out the challenge*), against, etc. (*Conclude as in book 1, chapter 3.*)

(1033) *Third count. For provoking and inciting the prosecutor to fight.*(g)

That the said A. B., being such evil disposed person and disturber of the peace of our said lord the king, as aforesaid, and intending to procure great bodily harm and mischief to be done to the said C. D., and to incite and provoke him the said C. D., unlawfully to fight a duel with and against the said E. F., afterwards, to wit, on, etc., with force and arms, at, etc., did unlawfully, wickedly, and maliciously provoke and incite the said C. D. (in the peace of God and our said lord the king then and there being), unlawfully to fight a duel with and against the said E. F., against, etc. (*Conclude as in book 1, chapter 3.*)

(1034) *For a verbal challenge.*(h)

That A. B., of, etc., gentleman, being an evil disposed person, and intending to do great bodily harm and mischief to one C. D., and to provoke and incite him the said C. D., unlawfully to fight a duel with him the said A. B., on, etc., at, etc., in pursuance of, and for the completing of his said intent and design, did unlawfully, wickedly, and maliciously, by opprobrious words and threatening language, provoke, incite, and challenge the said C. D. unlawfully to fight a duel with and against him the said A. B., against, etc. (*Conclude as in book 1, chapter 3.*)

(1035) *Giving a challenge in the presence of a justice of the peace.*(i)

That G. W., of, etc., on, etc., at, etc., and within the jurisdiction of this court, with force and arms, etc., and in the presence and hearing of J. F., Esq., then and there being one of the justices of this commonwealth, the peace in the said county to keep, assigned, and in the due execution of his said office, unlawfully and contemptuously did provoke and challenge one A. H. to fight with him the said G. with deadly weapons, to wit,

(g) 2 Stark. on Slander, 362.

(h) Davis's Prec. p. 87. Taken by Mr. Davis from 3 Chit. C. L. 850.

(i) Drawn in 1789 by Mr. Bradford, then attorney-general of Pennsylvania.

with pistols, in contempt of the laws, to the evil example of all others, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1036) *For sending a challenge, in Pennsylvania.*

That A. B., of, etc., on, etc., at, etc., and within, etc., a certain C. D., in the peace of God, etc., then and there being, with force and arms, etc., to fight with swords, pistols, and other dangerous and destructive weapons, did provoke and challenge, with intention the said C. D. to kill and murder, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1037) *Accepting a challenge.*

That C. D., of, etc., on, etc., at, etc., and within, etc., a provocation and challenge to fight with swords and pistols, and other dangerous and destructive weapons, unjustly and unlawfully from a certain A. B. did accept, receive, and take, contrary, etc. (*as above.*)

(1038) *Engaging in a duel, under Ohio statute.*

That A. B., of the county aforesaid, being a person regardless of the life of man, on the day of in the year of our Lord one thousand eight hundred and at the county of aforesaid, did unlawfully and voluntarily engage in and fight a duel with one M. N. then and there being, with deadly weapons, to wit, with pistols then and there loaded with gunpowder and leaden bullets (*or other weapons, naming them*), to the great hazard of the lives of the said A. B. and M. N., from which duel engaged in as aforesaid, by the said A. B. and M. N., no death did ensue; contrary, etc.

(1039) *Being second in a duel, under Ohio statute.*

(*Follow the form last above given to the end, and then proceed thus*): and that one C. D., then and there being a person regardless of the life of man, then and there, to wit, on the said day of in the year aforesaid, at the county of aforesaid, did unlawfully, knowingly, and voluntarily become, and then and there unlawfully, knowingly, and voluntarily was second to the said A. B., in engaging in and fighting the duel aforesaid; contrary, etc.

(1040) *Against a second for carrying a challenge, under the South Carolina statute.(j)*

That B. C. Y., late of, etc., being resident in and citizen of the state of South Carolina aforesaid, intending to procure great bodily harm and mischief to be done to one T. C. P., of, etc., and to incite and provoke him the said T. C. P. unlawfully to fight a duel with and against one J. C. C., of, etc., on, etc., with force and arms, at, etc., did unlawfully and wickedly carry, convey, and deliver, and cause to be carried, conveyed, and delivered, a certain written challenge of and from the said J. C. C., to the said T. C. P., to fight a duel with and against him the said J. C. C., which said written challenge is as follows, that is to say (*here set out the letter with the proper innuendoes*), to the great damage of the said T. C. P., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1041) *Second count. Same as first, omitting to set out letter.*

Third count.

That the said B. C. Y., being resident, etc., intending to procure great bodily harm and mischief to be done to one T. C. P., and to provoke and incite the said T. C. P. unlawfully to fight a duel with and against one J. C. C., on, etc., with force and arms, at, etc., aforesaid, was directly concerned unlawfully in carrying to the said T. C. P. a challenge to fight a duel with and against the said J. C. C., which said challenge was in writing in the form of a letter addressed to Mr. T. C. P., as follows, that is to say (*here set forth the letter with the proper innuendoes*), to the great damage of the said T. C. P., to the evil example of all others, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1042) *For being a second in a duel.(k)*

That A. B., of, etc., gentleman, on, etc., with force and arms, at, etc., did voluntarily engage in a duel with one C. D., with dangerous weapons, to wit, with pistols, then and there loaded with gun-

(j) Held good in *State v. Cunningham*, 2 Spear, 248.

(k) Davis's Prec. p. 90. This indictment was prepared by Mr. Davis, and is drawn upon the Mass. Stat. of 1894, ch. 123, § 6.

powder and leaden bullets, to the great hazard of the lives of the said A. B. and C. D., in which duel, engaged in as aforesaid, no homicide did ensue thereon; and the jurors, etc., do further present, that E. F., of, etc., gentleman, being a person regardless of the life of man, and holding in contempt the authority and government of the supreme giver and disposer of human life, on, etc., in the year aforesaid, with force and arms, at B. aforesaid, in the county aforesaid, did knowingly and voluntarily become, and then and there knowingly and voluntarily was, the second of the said C. D., and was then and there knowingly and voluntarily an agent and abettor of him the said C. D. in the duel and challenge aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1043) *Sending a written message to a person to fight a duel.* *Rev. Sts. of Mass. ch. 125, § 6.*

The jurors, etc., upon their oath present, that C. D., late of B., in the county of S., laborer, on the first day of June in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, wilfully and maliciously did send a certain written message to one E. F., purporting and intended to be a challenge to the said E. F., to fight a duel with the said C. D., with a deadly weapon, to wit, a pistol, which written message is of the tenor following, that is to say (*here set out a copy of the message*); against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(1044) *Posting another for not fighting a duel.* *Rev. Sts. of Mass. ch. 125, § 8.*

The jurors, etc., upon their oath present, that A. B., late of, etc., on the first day of June, in the year of our Lord with force and arms, at W., in the county of W., wickedly, wilfully, and maliciously did challenge one C. D. to fight a duel with the said A. B., with deadly weapons, to wit, with pistols; and that the said C. D. having then and there refused to fight the duel aforesaid with the said A. B., in pursuance of the challenge aforesaid, the said A. B. afterwards, to wit, on the same day and year aforesaid, at W., in the county aforesaid, did wickedly and maliciously post and expose the said C. D. to public reproach,

by then and there placing and exposing to public view, to wit, on the City Hall in W. aforesaid, in the county aforesaid, a certain writing, with the name of the said A. B. thereunto subscribed, containing reproachful and contemptuous language to and concerning the said C. D., which writing is of the tenor following, that is to say (*here insert a copy*); against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(1045) *Challenging and posting, at common law.*(l)

That A. B., late of, etc., esquire, being a person of a turbulent, wicked, and malicious disposition, and not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, and wickedly and maliciously intending, as much as in him lay, not only to terrify and affright one C., a good and peaceable subject of our said lord the king, but also to kill and murder him, heretofore, to wit, on, etc., with force and arms, at, etc., unlawfully and wickedly did provoke and challenge the said C. to fight a duel against him the said A. B. with sword and pistol, and, etc., that the said C. having then and there refused to fight with the said A. B. in pursuance of such wicked and unlawful challenge last aforesaid, he the said A. B., for the completing his aforesaid evil and wicked purpose and design, and further to provoke and incite the said C. to fight a duel against him the said A. B. in the manner aforesaid, afterwards, to wit, on the same day and year aforesaid, at C. aforesaid, in the county aforesaid, did wickedly and maliciously place, stick up and upon, and cause to be placed, stuck up, and exposed to public view, to wit, on the market-house in C. aforesaid, a certain paper writing, with the name of him the said A. B. thereunto subscribed, containing certain scurrilous and abusive matter against the said C., of the tenor following, that is to say (*here set out the letter with the proper innuendoes*), to the great damage and terror of him the said C. F., and against, etc. (*Conclude as in book 1, chapter 3.*)

(l) 2 Stark. on Slander, 363. See for a form of posting alone, 942.

CHAPTER XII.

ATTEMPTS AND SOLICITATIONS TO COMMIT OFFENCES.^(a)

- (1046) Attempt to commit an offence.
- (1047) Attempt to burn dwelling-house. Rev. Sts. of Mass. ch. 133, § 12.
- (1048) Attempt to burn a dwelling-house in the night-time, by breaking and entering a building, and setting fire to the same. Rev. Sts. of Mass. ch. 133, § 12.
- (1049) Attempt to commit a larceny from the person of an individual, by picking his pocket. Rev. Sts. of Mass. ch. 133, § 12.
- (1050) Attempt to commit arson, etc., in New York, under 2 Rev. Stat. 698, § 3.
First count, attempt to set fire, etc.
- (1051) Second count. Soliciting another to commit arson, etc.
- (1052) Attempt to set fire to a house, at common law.
- (1053) Conveying instruments into a prison with intent to facilitate the escape of a prisoner.
- (1054) Lying in wait near a jail, in order to secure a prisoner's escape, at common law.

(a) While an attempt to commit a felony is in itself a misdemeanor (1 Hawk. P. C. 55; Higgins's case, 2 East, R. 21; R. v. Kinnersly, 1 Strange, 196), an attempt to commit even a misdemeanor is indictable. Higgins's case, 2 East, R. 8; R. v. Phillips, 6 East, 464; State v. Murray, 15 Maine, 100; State v. Keys, 8 Vt. 57; Com. v. Harrington, 3 Pick. 26; State v. Avery, 7 Conn. 267; Damarest v. Haring, 6 Cow. 76. See Wh. Cr. L. 8th ed. §§ 173 *et seq.* Thus it is an indictable offence to advise A., against whom a sheriff has a precept, and whom he is about to arrest, to draw a line on the ground and forbid the officer to pass it, asserting at the time that if the sheriff passed the ground and A. killed him, the law was on A.'s side (State v. Caldwell, 2 Tyler, 212); to lie in wait near a jail, by agreement with a prisoner, and to carry him away (People v. Washburn, 10 Johns. R. 160); to send threatening letters (U. S. v. Ravara, 2 Dall. 597); to challenge another to fight with fists (Com. v. Whitehead, 2 Boston Law R. 148); to challenge another to fight under any circumstances, though not in such a way as to constitute the statutory offence (State v. Farrier, 1 Hawks, 487; State v. Taylor, 3 Brev. 243); or to even intimate to another a desire to fight with deadly weapons. Com. v. Tibbs, 1 Dana, 524. See *supra*, § 103.

In an indictment for attempting to commit an offence, it is not necessary to maintain an exactness as great as that which is essential in an indictment for the offence itself (R. v. Higgins, 2 East, 5; People v. Bush, 4 Hill. 133; see Wh. Cr. L. 8th ed. §§ 173 *et seq.*). But while this is the case, the same laxity is not permitted as is allowed in indictments for assaults, unless there be statutes making specific attempts distinctively indictable. At common law the indictment must aver the circumstances of the attempt. Wh. Cr. L. 8th ed. §§ 190 *et seq.*

- (1055) Keeping keys with intent to commit burglary.
- (1056) Having in possession implements of burglary.
- (1056a) Attempting to drown.
- (1056b) Attempt to murder by explosion.
- (1056c) Administering chloroform with criminal intent.
- (1057) Attempt to obtain money by means of false pretences.
- (1058) Poisoning. By mixing arsenic with water, and administering the same with intent to kill, under Ohio statute.
- (1059) Administering poison with intent to murder.
- (1059a) Administering poison with intent to produce miscarriage.
- (1059b) Administering poison with intent to murder.
- (1059c) Administering poison so as to endanger life.
- (1060) Attempt to commit suicide.
- (1060a) Soliciting to buggery.

(1046) *Attempt to commit an offence.*

That A. B., of, etc., on, etc., at, etc., did attempt to commit an offence prohibited by law, to wit, did attempt, with force and arms, to (*state the offence*), that being an offence prohibited by law, and in such attempt did then and there do a certain overt act towards the commission of said offence, to wit, did then and there, with force and arms (*state the act done, etc.*)(*b*); but that the said A. B. then and there did fail in the perpetration of said offence, and was intercepted and prevented in the execution of the same, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1047) *Attempt to burn dwelling-house.* *Rev. Sts. of Mass. ch. 123,*
§ 12.

That A. B., late of B., in the county of S., yeoman, on the first day of June, in the year of our Lord at B., in the county of S., did feloniously, wilfully, and maliciously attempt to set fire to and burn a certain dwelling-house of one C. D., then occupied by one E. F., there situate, and in such attempt did then and there place a quantity of combustible materials on certain boards under said dwelling-house, and did then and there set fire to said combustible materials, with the intent thereby then and there to burn said dwelling-house; but the said A. B.

(*b*) There must at common law be some specification to indicate that the thing attempted was illegal, and that the attempt went further than a mere preparation. Wh. Cr. L. 8th ed. § 190.

did then and there fail in the perpetration of said offence, so as aforesaid attempted to be perpetrated by him; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

- (1048) *For an attempt to burn a dwelling-house in the night-time, by breaking and entering a building, and setting fire to the same.*
Rev. Sts. of Mass. ch. 133, § 12.(c)

That John Harney, late of, etc., on the seventh day of May, in the year of our Lord at Roxbury, in the county of Norfolk, in the night-time of the same day, did attempt wilfully and maliciously to set fire to and burn, in the night-time, a certain dwelling-house there situate, of one Bernard Walmire, and in such attempt did then and there break and enter a certain out-house then and there situated, of the said Walmire, and within the curtilage of said dwelling-house, and did then and there procure and collect together certain shavings and combustible substances, and did then and there in said out-house set fire to, kindle, and burn said shavings and combustible substances, with the intent then and there to set fire to and burn, in the night-time, the dwelling-house aforesaid, and towards the commission of such offence, but was then and there intercepted and prevented in the execution of the same; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

- (1049) *For an attempt to commit a larceny from the person of an individual, by picking his pocket.* *Rev. Sts. of Mass. ch. 133, § 12.(d)*

That C. D., late of B., in the county of S., laborer, on the first day of June, in the year of our Lord at B., in the county of S., did attempt to commit an offence prohibited by law, to wit, did attempt, with force and arms, feloniously to steal, take, and carry away, from the person of one A. B., his personal property, then in his pocket and in his possession, that being an offence prohibited by law, and in such attempt did then and there do a

(c) This count was sustained in *Com. v. Harney*, 10 Metcalf, 422.

(d) *Tr. & H. Prec.* 52. See *Com. v. McDonald*, 5 Cushing, 365.

certain overt act towards the commission of said offence, to wit, did then and there, with force and arms, feloniously, and with intent then and there feloniously to steal, take, and carry away, the property of the said A. B., then and there being in his pocket on his person, thrust, insert, put, and place his said C. D.'s hand into the pocket of the said A. B., without his knowledge and against his will, but said C. D. then and there did fail in the perpetration of said offence of stealing from the person of said A. B., and was then and there intercepted and prevented in the execution of the same; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(1050) *Attempting to commit arson, etc., in New York, under 2 Rev. Sts. 698, § 3. First count, attempting to set fire, etc.(e)*

That A. B., etc., on, etc., at, etc., did attempt unlawfully, feloniously, and wilfully to set fire to a certain barn of J. S., situate, etc., with intent to injure the said J. S., etc., against, etc. (*Conclude as in book 1, chapter 3*)

(1051) *Second count. Soliciting another to commit arson, etc.(f)*

That, etc., on, etc., at, etc., unlawfully, falsely, and wickedly did solicit and incite one K. unlawfully, feloniously, and wilfully, in the night-time, to set fire to a certain barn of said J. S., situate, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

(1052) *Attempt to set fire to a house, at common law.*

That M. I., late of, etc., spinster, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, the dwelling-

(e) *People v. Bush*, 4 Hill, 133. The first of these counts was held good under 2 R. S. 583, 2d ed. § 3; and the second as a misdemeanor at common law. The general principle was laid down, that in cases of indictments for attempts it is not necessary to point out the specific means by which the attempt is to be consummated. But this cannot be sustained. To charge a man with attempting to do a wrong, is almost as loose as would be to charge him with "designing" or "meaning" to do the thing. Some attempts to commit a felony are not indictable, from the fact that they consist in mere preparation. See Wh. Cr. L. 8th ed. § 180. And the indictment ought to distinguish indictable from non-indictable attempts.

(f) I give this count on account of the high authority by which it is sustained, but I do not think it sets forth an offence indictable at common law. Wh. Cr. L. 8th ed. § 179.

house of S. C., there situate, unlawfully and wickedly did attempt and endeavor to set fire to, burn, and destroy, with an intent feloniously, voluntarily, and maliciously to burn and consume the same, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1053) *Conveying instruments into a prison, with intent to facilitate the escape of a prisoner.*(g)

That heretofore, to wit, on, etc., at, etc., A. B., Esq., then being one of the justices of the peace in and for the said county of duly and legally authorized and qualified to discharge and perform the duties of that office, did make out his warrant of commitment in due form of law, bearing date the day and year aforesaid, directed to the keeper of the commonwealth's jail in aforesaid, his under-keeper or deputy, by which said warrant of commitment the said justice did require the keeper of said jail, his under-keeper or deputy, to receive into their custody the body of one C. D., who was therewith sent to them the said keeper, his under-keeper or deputy (the said C. D. having been brought before him the said justice, and charged upon the oath of E. F. with having feloniously taken, stolen, and carried away a certain gelding, of the value of dollars, the property of him the said E. F.), and him the said C. D. safely to keep until he should be discharged by due course of law; which said warrant of commitment is as follows (*here set forth the warrant of commitment*); by virtue of which said warrant the said C. D. afterwards, to wit, on the same day and year aforesaid, at B. aforesaid, was conveyed, committed, and delivered to the commonwealth's said jail, situated in said B., and to the keeper thereof, for the cause aforesaid, to wit, for the felony and larceny aforesaid; and the said C. D. was then and there lawfully detained and kept a prisoner in the aforesaid jail, under the custody of I. J., Esq., then the keeper of said jail, for the felony aforesaid. And the jurors aforesaid, upon their oath aforesaid, do further present, that K. L., of in the county aforesaid,

(g) Davis's Prec. 117. "This precedent," says Mr. Davis, "is drawn upon the second section of the statute of Mass. of 1784, ch. 41. It also concludes at common law. See a similar precedent in Stark. 612, drawn upon the statute of 16 Geo. II. c. 31, s. 1; also another in Cro. C. A. 328."

laborer, on the day of at B. aforesaid, in the county aforesaid, did unlawfully convey, and did cause and procure to be unlawfully conveyed, into the said jail and prison, two steel files, being instruments proper to facilitate the escape of prisoners out of the jail and prison aforesaid, and the same files did then and there deliver, and cause and procure to be delivered, to the said C. D. (he being then and there a prisoner in said jail and prison, and then and there lawfully detained therein for the felony and larceny aforesaid), without the knowledge and privity of said keeper of said jail and prison, or of any under-keeper of the same, which said files, being such instruments as aforesaid, were then and there so conveyed into the said jail and prison, and delivered to the said C. D. as aforesaid, by him the said K. L., with an intent that he the said C. D. might thereby and therewith break the said jail and prison, and unlawfully work himself out of the same, and with intent to aid and assist the said C. D. to escape and attempt to escape from and out of the said jail and prison, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1054) *Lying in wait near a jail, in order to secure a prisoner's escape, at common law.*(h)

That A. B., Esq., then being one of the justices of the peace in and for the county of duly and legally commissioned, authorized, and qualified to discharge the duties of that office, did make out his warrant of commitment, in due form of law, under his hand and seal, dated, etc., directed to the keeper of (his under-keeper or deputy), by which said warrant (*setting out the warrant*), as by the same warrant more fully appears, by virtue of which said warrant of commitment, afterwards, to wit, on, etc., at, etc., C. D., then being keeper of the said jail, etc., of the said county, etc., did receive the said A. T. as a prisoner in the jail aforesaid, etc.(i) And the inquest aforesaid, etc., do further present, that J. T., etc., on, etc., at, etc., being well acquainted with the premises aforesaid, and while the said A. T.

(h) This was meant as a statutory misdemeanor, but as the offence was not stated as such, the indictment was sustained as at common law. *People v. Tomkins*, 9 Johns. 71.

(i) See 2 Chit. C. L. 175.

was then in the jail aforesaid, under the custody aforesaid, did unlawfully and knowingly combine and conspire with the said A. T., and near the said jail did lie in wait, to the intent and purpose that the said A. T. might thereby be enabled to escape; and that pursuant to the contrivance and conspiracy of the defendant with the said A. T., and by his means and procurement, she did escape and go at large from the said jail, and so the said J. T. did convey the said A. T. away, and assist her in escaping from the said jail, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1055) *Keeping keys with intent to commit burglary.(j)*

That J. B., late of, etc., yeoman, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, etc., twenty false keys made of iron, in his custody and possession unlawfully had and kept, with a wicked intent the dwelling-houses of the citizens of this state, in the night-time, feloniously and burglariously to break, and with the same false keys to open and enter, and the goods and chattels of the same citizens in the same dwelling-houses being, feloniously and burglariously to steal, take, and carry away, against, etc. (*Conclude as in book 1, chapter 3.*)

(1056) *Having in possession implements of burglary.(k)*

That C. D., late of B. in the county of S., laborer, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, knowingly did have in his possession certain implements, that is to say, ten skeleton keys, adapted and designed for forcing and breaking open the dwelling-house of one E. F. there situate, with intent then and there, in the night-time of the said day, the dwelling-house of the said E. F. there situate, feloniously and burglariously to break and enter, and then and there, in the night-time as aforesaid, the goods and chattels of the said E. F., in the same dwelling-house then and there being, feloniously and burglariously to steal, take, and

(j) Drawn by Mr. Bradford, attorney-general of Pennsylvania, in 1789.

(k) See *R. v. Oldham*, 2 Den. C. C. 472; 5 Cox. 551; 14 Eng. Law & Eq. Rep. 568. See also *Hackett v. Com.*, 15 Penn. St. 95. Wh. Cr. L. 8th ed. §§ 173, 192, 810, 811, 1067.

carry away; the said C. D. then and there well knowing the said implements to be adapted and designed for the purpose aforesaid, with intent then and there feloniously and burglariously to use and employ the said implements for the purpose aforesaid; against the peace of said commonwealth, and contrary to the form of the statute in such case made and provided.

(1056a) *Attempting to drown, etc., with intent to murder.*

—feloniously and unlawfully did take one J. N. into both the hands of him the said J. S., and feloniously and unlawfully did cast, throw, and push the said J. N. into a certain pond, wherein there was a great quantity of water, and did thereby then feloniously and unlawfully attempt the said J. N. to drown and suffocate (“*drown, suffocate, or strangle*”), with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against, etc.

[Add a count charging generally that the defendant did attempt to drown J. N., etc.; and counts charging the intent to be “to commit murder.”](l)

(1056b) *Attempt to murder by explosion.*

—feloniously, unlawfully, and maliciously did, by the explosion of a certain explosive substance, that is to say, gunpowder, destroy (“*destroy or damage*”) a certain building situate in the parish of in the county aforesaid, with intent thereby then feloniously, wilfully, and of his malice aforethought, one J. N. to kill and murder; against, etc.

[Add a count charging intent to be “to commit murder.”](m)

(1056c) *Administering chloroform with criminal intent, under English statute.*

—feloniously and unlawfully did apply and administer to one J. N. (“*apply or administer to or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by*”) certain chloroform (“*any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing*”), with intent

(l) Arch. C. P. 19th ed. p. 708, under English statute.

(m) Arch. C. P. 19th ed. p. 711, on English statute.

thereby then to enable him the said J. S. [or one A. B.], the moneys, goods and chattels of the said J. N., feloniously and unlawfully to steal, take, and carry away (“*with intent thereby to enable himself or any other person to commit, or with intent thereby to assist any other person in committing any indictable offence*”); against the form [as ante]. [*If it be not certain that it was chloroform (or laudanum) that was administered, add a count or counts stating it to be “a certain stupefying and overpowering drug and matter, to the jurors aforesaid unknown.” Add also counts varying the intent, if necessary.*](n)

(1057) *Attempt to obtain money by means of false pretence.*

The jurors, etc., upon their oath present, that A. B., late of B., in the county of S., trader, on the first day of June, in the year of our Lord at B. aforesaid, in the county aforesaid, unlawfully, knowingly, and designedly did falsely pretend to C. D., that the said A. B. was then and there sent to the said C. D. by one E. F. to request the loan of ten dollars, and that the said E. F. desired the said A. B. to say that the said E. F. would repay the same to the said C. D. on the next following day; by means of which said false pretences the said A. B. did then and there unlawfully, knowingly, and designedly attempt and endeavor to obtain from the said C. D. certain money, to wit, the sum of ten dollars of the moneys of the said C. D., with intent then and there to cheat and defraud the said C. D. of the same. Whereas, in truth and in fact, the said A. B. was not sent to the said C. D. by the said E. F. to request the loan of ten dollars, or any other sum of money; and whereas, in truth and in fact, the said E. F. did not say, or desire the said A. B. to say, that the said E. F. would repay the same to the said C. D. on the next following day, as the said A. B. then and there well knew; contrary to the form of the statute in such case made and provided, etc.

(n) Arch. C. P. 19th ed. p. 728. For administering cantharides, see *supra*, 138a.

(1058) *Poisoning, by mixing arsenic with water, and administering the same with intent to kill, under Ohio statute.*(o)

That A. B. and C. D., on the thirty-first day of January, in the year of our Lord one thousand eight hundred and fifty-four, in the county of Hamilton aforesaid, unlawfully, wilfully, and with malice aforethought, a certain quantity, to wit, four ounces, of white arsenic, then and there being a deadly poison, did put, mix, and mingle into and with a certain quantity of water, to wit, the quantity of one quart of water, and the said poison being so mixed and mingled as aforesaid, they the said A. B. and C. D., then and there well knowing the said white arsenic to be so mixed and mingled as aforesaid, and then and there well knowing the said white arsenic to be a deadly poison, on the day and year aforesaid, and in the county aforesaid, did unlawfully, wilfully, and with malice aforethought, administer the said white arsenic, so mixed and mingled as aforesaid with the water aforesaid, to one M. N., then and there being, for the purpose and with the intent then and there to destroy and take the life of him the said M. N.

(1059) *Administering poison with intent to murder.*(p)

That A. B., etc., on, etc., in the county aforesaid, feloniously and unlawfully did administer to one J. N. ("administer to or cause to be taken by any person"), a large quantity of a certain deadly poison called _____, to wit, two drachms of the said _____ ("any poison or other destructive thing"), with intent then and there and thereby feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(o) Warren's C. L. 93.

(p) This form is based on 7 Wm. 4 and 1 Vict. c. 85, s. 2, which enact that "whosoever shall administer, or cause to administer to, or cause to be taken by any person, any poison or other destructive thing," "shall be guilty of felony," etc. The form in the text, however, would undoubtedly be held good as at common law in those states where no statute exists.

(1059a) *Administering poison with intent to procure miscarriage, under English statute.*

That J. S., etc., at, etc., on, etc., feloniously and unlawfully did administer to and cause to be taken by one A. N., a large quantity, to wit, two ounces, of a certain noxious thing called savin, with intent thereby then to procure the miscarriage of the said A. N., against, etc.(q) (*Conclude as in book 1, chapter 3.*)

(1059b) *Administering poison with intent to murder, under English statute.*

—feloniously and unlawfully did administer to one J. N. (“administer to or cause to be administered to or to be taken by any person”) a large quantity, to wit, two drachms of a certain deadly poison called white arsenic (“any poison or other destructive thing”), with intent thereby then feloniously, wilfully, and of his malice aforethought, the said J. N. to kill and murder; against the form of the statute in such case made and provided, and against the peace of our lady the queen, her crown and dignity. [Add counts stating that the defendant “did cause to be administered to J. N.,” and “did cause to be taken by J. N. a large quantity,” etc.; and if the description of poison be doubtful, add counts describing it in different ways; and one count stating it to be “a certain destructive thing to the jurors aforesaid unknown.” The indictment must allege the thing administered to be poisonous or destructive; and, therefore, an indictment for administering sponge mixed with milk, not alleging the sponge to be destructive, was holden bad. *R. v. Powles*, 4 C. & P. 571. If there be any doubt whether the poison was intended for J. N., add a count stating the intent to be “to commit murder” generally. See *R. v. Ryan*, 2 M. & Rob. 213.](r) (*Conclude as in book 1, chapter 3.*)

(1059c) *Administering poison so as to endanger life, etc., under English statute.*

—feloniously, unlawfully, and maliciously did administer to one J. N. (“administer to or cause to be administered to or taken by

(q) Arch. C. P. 19th ed. p. 771.

(r) Arch. C. P. 19th ed. p. 706.

any person") a large quantity, to wit, two drachms of a certain deadly poison called white arsenic ("*any poison or other destructive or noxious thing*"), and thereby then did endanger the life of the said J. N. ; against, etc. [*Add a count stating that the defendant "did cause to be taken by J. N. a large quantity," etc.*](s) (*Conclude as in book 1, chapter 3.*)

(1060) *Attempting to commit suicide.*(t)

The jurors, etc., upon their oath present, that Marian, the wife of Henry Thomas Johnson, late of B., in the county of S., laborer, on the first day of June, in the year of our Lord with force and arms, at B. aforesaid, in the county aforesaid, unlawfully and wilfully did cast and throw herself from and off a certain steamboat called the "Bee," then and there being propelled along the waters of a certain river there, called the Thames, into the waters of the said river, with the wicked intent and purpose of then and there feloniously, wilfully, and of her malice aforethought, choking, suffocating, drowning, and murdering herself in and by the waters aforesaid. And so the jurors aforesaid, upon their oath aforesaid, do say, that the said M. J., on the day and year aforesaid, at B. aforesaid, in the county aforesaid, unlawfully, wilfully, and wickedly did attempt and endeavor feloniously, wilfully, and of her malice aforethought, to kill and murder herself in the manner aforesaid ; against the peace, etc.

(1060a) *Letter soliciting to buggery.*

That E. R., etc., on, etc., at, etc., unlawfully, wickedly, and indecently did write and send, and cause and procure to be written and sent to W. D. G. O., a certain letter, to wit, the letter mentioned and set forth in the first count of this indictment, with intent thereby to move and incite the said W. D. G. O., to attempt and endeavor, feloniously, and wickedly, to commit and perpetrate with him the said E. R., the detestable crime of buggery, and by the means aforesaid did unlawfully and wickedly attempt and endeavor to incite the said W. D. G. O.,

(s) Arch. C. P. 19th ed. p. 729.

(t) See 5 Cox, C. C. Appendix, p. xcii. for indictments for participation in suicide ; and see also *ante*, 107, 138.

to attempt to commit and perpetrate with him the said E. R. the detestable, horrid, and abominable crime aforesaid, against, etc.(u) · (*Conclude as in book 1, chapter 3.*)

(u) It was held in *R. v. Ransford*, 13 Cox C. C. 9, that this count charged an indictable misdemeanor.

The evidence was that O. was a boy at school, and that he had received two other letters from the prisoner, which he read, but that when he received the one mentioned in the above count he did not read it, nor was he in any way aware of its contents, but handed it over to the school authorities. It was ruled that the sending the letter proved the attempt to incite, although it might be doubtful whether it could be said to amount to inciting or soliciting, inasmuch as O. was not aware of its contents.

Pollock, B.—I am clearly of opinion that the seventh count is good. In *Schofield's case* (Cald. 397), Lord Mansfield, C. J., says: "So long as an act rests on bare intention, it is not punishable, but immediately when an act is done, the law judges not only of the act done, but the intent with which it is done, and if accompanied with an unlawful and malicious intent, though the act itself would otherwise have been innocent, the intent being criminal, the act becomes criminal and punishable." Was, then, the third letter, with its inclosure, an act done with a criminal intent? I think that the sending of it to the boy with a criminal intent was a criminal act done, though the letter was not seen by the boy, within the above dictum of Lord Mansfield. See Wh. Cr. L. 8th ed. § 172. That a solicitation to commit adultery is not indictable, see *Ibid.*

CHAPTER XIII.

REVOLT, PIRACY, AND VIOLATION OF THE LAWS CONCERNING THE SLAVE-TRADE.^(a)

- (1061) Making a revolt.
- (1062) Endeavoring to make a revolt.
- (1063) Same, setting out the "endeavor" to consist in a conspiracy, etc.
- (1064) Setting out the endeavor to consist in a solicitation of others to neglect their duty, etc.
- (1065) Setting out the endeavor to consist in an assemblage of the crew in a riotous manner, etc.
- (1066) Laying the time with a *continuando*.
- (1067) Piracy, at common law.
- (1068) Riot on board ship.
- (1069) Confining the master, etc.
- (1070) Piratically and feloniously running away with a vessel, and aiding and abetting therein, etc., and assaulting master.
First count, running away with vessel.
- (1071) Running away with goods, etc.
- (1072) Same, stated more specially.
- (1073) Assaulting master and running away with goods, etc.
- (1074) Against principal offender for running away with vessel.
- (1075) Against others as accessories.
- (1076) Breaking and boarding a ship, assaulting, etc., the crew, and stealing, etc., the cargo.
- (1077) Piratically breaking into, taking, and carrying away a ship and certain goods on board the same.
- (1078) Against a seaman for laying violent hands upon his commander, with intent to prevent his fighting in defence of his ship.
- (1079) Attempting to corrupt a seaman to turn marauder, and to run away with a ship.
- (1080) Against an accessory to a piracy before the fact.
- (1081) Against an accessory to a piracy after the fact.
- (1082) Fitting, equipping, and preparing, and being concerned in fitting, etc., vessels for the slave-trade in ports of the United States, as master or owner, under the Act of 20th April, 1818, §§ 2, 3.
- (1083) Same, but leaving out allegation that offence was after the act, and averring defendant caused the vessel to sail.

(a) See Wh. Cr. L. 8th ed. § 1876.

- (1084) Preparing the vessel, etc.
- (1085) Aiding and abetting in preparing, etc.
- (1086) Serving on board of a vessel engaged in the slave-trade, under act of 10th May, 1800, §§ 2, 3. First count, the vessel being American.
- (1087) Second count, the vessel being foreign.
- (1088) Third count. Same, stated more specially.
- (1089) Another form for the same.
- (1090) Fitting out slaver, etc.
- (1091) Forcibly confining and detaining negroes taken from the coast of Africa, with intention of making slaves of them, and for aiding and abetting, under act of 15th May, 1820, § 5.
- (1092) Against a part of defendants as principals and the others as accessories.
- (1093) Taking on board and receiving from the coast of Africa, negroes, etc., under the act of 20th April, 1818, § 4.
- (1094) Forcibly bringing and carrying away negroes from the coast of Africa, for the purpose of making slaves of them, under act of 15th May, 1820, § 4.

(1061) *Making a revolt.*

That H. G. *et al.*, all late, etc., on, etc., in and on board of a certain American ship and vessel called the "Hibernia," then lying within the jurisdiction of a foreign state and sovereign, to wit, at, etc., the same then and there being an American ship and vessel, belonging to certain persons, citizens of the United States, whose names are to the jurors aforesaid as yet unknown, and which ship or vessel one A. B. was then and there master, with force and arms, did make a revolt, etc. (by unlawfully, wilfully, and with force usurping the command of such ship and vessel from the said the master thereof, *or*, by unlawfully, wilfully, and with force depriving the said the master thereof, of his authority and command on board of the said vessel, etc.), (b) they, the said H. G. *et al.*, then and there being

(b) One of the segments of the passage in brackets, or an averment of a similar character under the act, is made necessary by the decision of Judge Kane, in the case of *U. S. v. Almeida*, Dist. Ct. U. S., Phil., Feb. 1847. (Wh. Cr. L. 8th ed. § 1880.) "The indictment," he said, "on which these prisoners were convicted a few days ago, charges that on the first day of November last, upon the high seas, etc., they, being 'seamen of an American vessel, to wit, the barque "Pons," with force and arms, did then and there feloniously make a revolt on board the said ship, contrary,' etc.

"A motion has been made in arrest of judgment, on the ground that the offence is not set forth in the indictment with adequate certainty; and it has

the crew of the said ship and vessel, against, etc., and contrary,

been contended that, under the acts of congress now in force, it was incumbent on the prosecution to set out more specifically the acts which make up the offence charged.

"The question presented by the record is more interesting than difficult: but as it appears to be of the first impression, it properly invites an exposition of the views of the court in deciding it.

"The law secures to every man who is brought to trial on a charge of crime, that the acts which constitute his alleged guilt shall be set forth with reasonable certainty in the indictment which he is called upon to plead to. This is his personal right—indispensable, to enable him to traverse the facts, if he believe them to be untrue; to deny their asserted legal bearing, if in his judgment they do not establish the crime imputed to him; or to admit at once the facts and the conclusions from them, if he be conscious of guilt. It is important to his protection also, in case he should be a second time charged for the same offence, that there should be no uncertainty as to that for which he was tried before. And besides all this, which may be supposed to regard the accused alone, it is necessary for the proper action and justification of the court, that it should clearly appear from facts patent on the record, that a specific, legally defined crime has been committed, for which sentence is to be awarded according to the laws that apply to it.

"There are exceptions, or rather limits, to the application of this principle; but they all refer themselves to the peculiar character of the offence charged. Thus, an indictment against a 'common barrator,' or for 'keeping a common gaming-house,' or 'a house of ill-fame,' is good without a specification of acts; for the essence of the offence in these cases is habitual character. So also, where the charge is not the absolute perpetration of an offence, but its primary characteristic lies in the intent, instigation, or motion of the party towards its perpetration; the acts of the accused, important only as developing the *mala mens*, and not constituting of themselves the crime, need not be spread upon the record. Such are certain cases of conspiracy, and those of attempt or solicitation, to commit a known crime; where the mental purpose may not have been matured into effective action, or has had reference to criminal action by a third party—a class of exceptions, this last, which vindicates much of the judicial action under this statute.

"But these are only exceptions: the principle is as broad as the common law. It is not enough, and never has been, to charge against a party a mere legal conclusion, as justly inferential from the facts that are not themselves disclosed on the record. You may not charge treason, murder, or piracy, in round general phrases. You must set out the act which constitutes it in the particular case.

"Following out the principle, it has always been held that where various acts have been enumerated in a statute, as included in the same category of crime, and to be punished alike, it is not enough to charge the violation of such a statute in disjunctive or alternative terms. That is to say, you must not charge its violation to have been in this or that or another particular, leaving the defendant uncertain which or how many of the enumerated particulars he is to answer to. He is entitled to precise notice of the accusation against him.

"All these are long recognized rules of the criminal law, framed for the protection of innocence, and not unfrequently essential to its safety. The court has no right to disregard them, even if it would; on the contrary, it is called upon by the highest duty that man can owe his fellow, to see to it that they lose none of that efficiency for good which is due to the uniformity and certainty of their application. The defendants have asserted of record, that in their case these rules of pleading have not been conformed to, that they have not had such notice of the offence charged against them as the law requires, and that there is not now within the judicial knowledge of the court that precise and specific assurance of

etc. (*Conclude as in book 1, chapter 3, and see 17, 18, 181, n., 239, n.*)

(*Add count for endeavoring to commit revolt as in next form.*(c))

their guilt, which can warrant us in pronouncing sentence upon this verdict. If it be so, they are not too late in bringing the fact to our notice.

"The indictment, it is understood, is in accordance with the precedents under the crimes' act of 1790. By the 8th section of that act it was enacted, that if any seaman shall lay violent hands on his commander, thereby to hinder him from defending his ship, or the goods committed to his trust, 'or shall make a revolt in the ship,' he shall be adjudged to be a pirate and a felon; and by the 12th section it was enacted, that if any seaman shall confine the master of any ship or vessel, or 'endeavor to make a revolt' in such ship, he shall on conviction suffer imprisonment and fine.

"Almost all the indictments that have been framed under this act for offences similar to the present, have charged the offence in the words of the 12th section, for 'endeavoring to make a revolt.' U. S. v. Bladen, 1 P. C. C. R. 213; U. S. v. Smith, 3 W. C. C. R. 78; U. S. v. Smith and Combs, 3 W. C. C. R. 526; U. S. v. Kelly, 4 W. C. C. R. 528; U. S. v. Smith, 1 Mas. 147; U. S. v. Hamilton, 1 Mas. 443; U. S. v. Keefe, 3 Mas. 457; U. S. v. Hemmer, 4 Mas. 105; U. S. v. Haines, 5 Mas. 272; U. S. v. Gardner, 5 Mas. 402; U. S. v. Barker, 5 Mas. 404; U. S. v. Savage, 5 Mas. 460; U. S. v. Thompson, 1 Sumn. 168; U. S. v. Morrison, 1 Sumn. 448; U. S. v. Ashton, 2 Sumn. 13; U. S. v. Cassidy, 2 Sumn. 582; U. S. v. Rogers, 3 Sumn. 342. Now, as we have already remarked, a charge for such an offence as was the subject of all these cases, resting merely in the endeavor, not going to the perfected act, was, according to all the authorities, well laid in the succinct descriptive words of the section; and in the only cases under the 8th section, in which the principal offence of making a revolt was charged (U. S. v. Sharp, 1 P. C. C. R. 118; Same v. Same, 1 P. C. C. R. 131; and U. S. v. Haskell, 4 W. C. C. R. 402), the indictment was quashed or the judgment arrested on other grounds, or else the acquittal of the prisoner made it necessary to discuss the question which is now before us. No sentence has ever been pronounced on such a conviction.

"Indeed, the courts before whom the cases were tried on indictments like this, though the particular question was not raised upon the pleadings, felt themselves embarrassed by the undefined phraseology of the act of congress, and Judge Washington more than once recommended to the jury not to find the defendant guilty of either making or endeavoring to make a revolt, however strong the evidence might be. See U. S. v. Sharp, and U. S. v. Bladen, *ut supra*.

"The question of the meaning of these terms was at last submitted to the supreme court of the United States, in a case that went up on a certificate of division from this circuit (U. S. v. Kelly, *ut supra*, and Wheat. 417), and in the spring of 1826 the import of the act of congress of 1790 was judicially determined.

"In 1835, however, a new act of congress was passed, which, obviously referring to the language of the supreme court in Kelly's case, yet not adopting it, proceeded to declare what violations of law should thereafter be deemed to constitute the crime of revolt. The language of the first section of this act is as follows:—

"'If any one or more of the crew of any American ship or vessel on the high seas, or on other waters within the admiralty or maritime jurisdiction of the United States, shall unlawfully, wilfully, and with force, or by fraud, threats, or other intimidations, usurp the command of such ship or vessel from the master, or other

(c) A count for a revolt may be joined with a count for an endeavor to commit a revolt, and after a general conviction, judgment will not be arrested on account of such joinder. U. S. v. Peterson, 1 Wood. & Min. 305.

(1062) *Endeavoring to make a revolt.(d)*

That A. B., late of, etc., C. D., late of, etc., and E. F., late of, etc. (*specify every one separately, as above*), heretofore, to wit, on,

lawful commanding officer thereof, or deprive him of his authority and command on board thereof, or resist or prevent him in the free and lawful exercise thereof, or transfer such authority and command to any other person not lawfully entitled thereto, every such person so offending, his aiders or abettors, shall be deemed guilty of a revolt or mutiny and felony; and shall, on conviction thereof, be punished by fine not exceeding two thousand dollars, and by imprisonment and confinement to hard labor not exceeding ten years, according to the nature and aggravation of the offence.'

• The unlawful acts, which now fall within the definition of a maritime revolt, are distributed by the language of this section into four categories or classes: 1. Simple resistance to the exercise of the captain's authority; 2. The deposition of the captain from his command; 3. The transfer of the captain's power to a third person; 4. The usurpation of the captain's power by the party accused.

• It is impossible to analyze the section as I have done, without remarking that the offences which it includes, however similar in character, differ widely in degree. The simple act of unpremeditated resistance to the captain cannot be identified with his formal degradation from the command, still less with the usurpation of his station, without overlooking the gradations of crime, and confounding the accidental turbulence of a heated sailor with the deliberate and daring triumphant conspiracy of mutineers.

• This indictment, however, makes no reference to these statutory distinctions. It pursues the precedents in use before the act, and charges all the prisoners, simply and alike, with 'making a revolt:' and in this, we are told, it conforms to other indictments which have been framed by different attorneys for the United States since the act was passed. But is there in this such a clear and specific description of the offence of each of these men as the rules of criminal pleading prescribe, and the language of the act has made easily practicable? Is it more than a charge in the alternative or disjunctive, when the terms in which the charge is made must be resolved into alternative or disjunctive propositions in order to be understood? Does this court see, on inspecting the record of this conviction, and will other courts, who may hereafter refer to it for a precedent, see that clear reference to the grades of guilt recognized by the act of congress, which should explain the difference properly to be made in the sentences of the prisoners?

• The circumstances of the case, as they are known to the judge who presided at the trial, illustrate the force of this last question. Among the prisoners is a principal officer of the ship, who, according to the evidence upon which the jury convicted him, was the moving spirit and principal actor of the revolt, who struck the captain to the deck with a deadly weapon, imprisoned him, bound, in a darkened state-room, with a sentry at the door, while he himself usurped the command of the ship, continuing to exercise it till he was within two hours' travel of the city. Another prisoner is a simple seaman, whose offence consisted in omitting to interfere for the captain's rescue, rather than in any more direct agency against him. Had the several categories of crime which the 8th section indicates formed the subjects of charge in as many counts of the indictment, is it not alto-

(d) *U. S. v. Veal*, New York, 1847. The defendant was convicted. See *Wh. Cr. L.* 5th ed. § 1880. The particularization of mode of endeavor is not given in the original form, as sustained by the court. But it should be given for the reasons stated in *Almeida's case*, *supra*. See *infra*, 1068-9.

etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there endeavor to make a revolt (and in pursuance of such endeavor did, etc., *specifying mode*), they, the said A. B., C. D., and E. F., then and there being (*state number*) of the crew of the said American vessel called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1063) *Second count. Same, setting out the "endeavor" to consist in a conspiracy, etc.*

That the said A. B., C. D., and E. F., heretofore, to wit, on, etc., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there endeavor to make a revolt, in this, that they, the said A. B., C. D., and E. F., did then and there combine, conspire, and confederate with K. L. and M. N., on board of the said vessel called the to make a revolt in and on board of the said vessel called the they the said

gether possible that, upon the same evidence, one of these would now stand convicted on several charges, the other of but one, and that the lightest on the list?

"But this is illustration merely: the argument is independent of it. The party accused is entitled to the most clear specification of his offence that his character and circumstances reasonably admit of; and it cannot be said that he has had this, when a more direct description is furnished in the very words of the act under which he is indicted. The judgment, therefore, must be arrested.

"In thus deciding upon the insufficiency of the indictment, the court is not insensible to the consideration that perhaps very little of essential wrong might have been sustained by either of the prisoners if we could lawfully have proceeded to the sentence. The facts cannot be more faithfully examined, nor the merits of the case more ably developed in argument, nor, as it seems to us, more candidly and intelligently apprehended by the jury, than they were in the protracted and laborious trial which recently closed. But we have no right to consider of policy, at best probable, in reference to a single case, when we are called on to apply the general principles of established law, and to register a precedent for the future action of the court. We perform a single and unmixed duty, when we declare, upon the call of the accused, what are their legal rights."—MS. Report.

then and there being (*state number*) of the crew of the said vessel called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Like second count, striking out*): "did then and there endeavor to make a revolt, in this, that they, the said ."

Fourth count.

(*Like third count, substituting*): "did then and there combine, conspire, and confederate with some other person or persons, on board of said vessel, being a called the to the jurors aforesaid unknown, to make a revolt," etc., for "did then and there combine, conspire, and confederate with on board of said called the to make a revolt," etc.

(1064) *Fifth count. Same as first, setting out the endeavor to consist in a solicitation of others to neglect their duty, etc.*

That the said A. B., C. D., etc. heretofore, to wit, on, etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there endeavor to make a revolt on board of said called the in this, that they, the said A. B., C. D., etc., did then and there solicit, incite, and stir up others of the crew of the said called the to the jurors aforesaid unknown, to neglect their proper duty on board of the said called the they the said being then and there of the crew of the said called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

(*Like fifth count, substituting*): "did then and there solicit, incite, and stir up others of the crew of the said vessel, being a called the to the jurors aforesaid unknown, to disobey and resist the lawful orders of the said the master of the said called the , for "did then and there solicit,

incite, and stir up others of the crew of the said called the
 to the jurors aforesaid unknown, to neglect their proper
 duty on board of the said called the .”

Seventh count.

(*Like sixth count, substituting*): “did then and there solicit,
 incite, and stir up other and others of the crew of the said vessel,
 being a called the to the jurors aforesaid unknown,
 to betray their proper trust on board thereof, they the said
 then and there being of the crew of the said called the
 against the peace,” etc., for “did then and there,” etc.

(1065) *Eighth count.* *Same as first count, setting out the endeavor
 to consist in an assemblage of the crew in a riotous manner, etc.*

And the jurors aforesaid, on their oath aforesaid, do further
 present, that the said heretofore, on the day of
 in the year of our Lord one thousand eight hundred and
 with force and arms, on the high seas, out of the jurisdiction of
 any particular state of the said United States of America, on
 waters within the admiralty and maritime jurisdiction of the
 said United States, and within the jurisdiction of this court, in
 and on board of a certain American vessel, being a called
 the whereof one was then and there the master and
 commander, did then and there endeavor to make a revolt in
 and on board of said called the in this, that they the
 said did then and there assemble with others of the crew
 of the said vessel, to the jurors aforesaid unknown, in a tumultu-
 ous and mutinous manner, they the said being then and
 there of the crew of the said called the against,
 etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Ninth count.

(*Like eighth count, inserting after*): “in a tumultuous and
 mutinous manner,” “in and on board of said called the
 and did then and there make a riot in and on board of the
 said called the .”

(1066) *Tenth count.* *Same as first, laying the time with a
 continuando.*

(*For final count, see 17, 18, 181, n., 239, n.*)

(1067) *Piracy, at common law.(e)*

That J. S., K. S., and L. T., on the first day of August, in the year of our Lord one thousand eight hundred and fifty-two, with force and arms, upon the high seas, *(f)* out of the jurisdiction of any particular state of the United States, and within the jurisdiction of this court, *(g)* to wit, in and on board *(h)* of a certain ship, called the "Windsor Castle," in a certain place upon the high seas, distant about ten leagues from Cutcheen, in the East

(e) This form, with a portion of the notes, is drawn from Archbold's C. P. 19th ed. 465.

(f) The offence must be proved to have been committed within the jurisdiction of the court of admiralty; that is, upon some part of the sea which is not *infra corpus comitatus*. Such is the general international rule. In England, all rivers in the country, until they flow past the furthest point of land next the sea, are within the jurisdiction of the courts of common law, and not of the court of admiralty (see 1 Co. 175; 3 Inst. 113; 3 T. R. 113; 1 Hawk. c. 37, s. 11); thus where the sea flows in between two points of land in the country, a straight imaginary line being drawn from one point to the other, the courts of common law have jurisdiction of all offences committed within that line; the court of admiralty of all offences without it. But see *R. v. Bruce*, R. & R. 242. But if a robbery be committed in creeks, harbors, ports, etc., in foreign countries, the court of admiralty indisputably has jurisdiction of it, and such offence is consequently piracy. *R. v. Jemot*, Old Bailey, 28th February, 1812, MSS. On an indictment for larceny out of a vessel lying in a river at Wampu, in China, the prosecutor gave no evidence, as to the tide flowing or otherwise where the vessel lay; but the judges held that the admiralty had jurisdiction, it being a place where great ships go. *R. v. Allen*, 1 Mood. C. C. 494. As to offences committed on the coasts, the admiralty have exclusive jurisdiction of offences committed beyond the low-water mark; and, between that and the high-water mark, the court of admiralty has jurisdiction of offences done upon the water when the tide is in; and the courts of common law of offences committed upon the strand when the tide is out. All the other parts of the high sea are indisputably within the jurisdiction of the admiralty.

In this country a vessel lying in the open roadstead of a foreign country, is held to be on the high seas. *U. S. v. Pirates*, 5 Wheat. 184. With us, it is not necessary to give the federal courts jurisdiction that the vessel should have belonged to citizens of the United States; it is enough if she had no national character, but was held by pirates, or persons not lawfully sailing any foreign flag. And the offence is equally cognizable by the U. S. courts if committed on board of a foreign vessel by a citizen of the U. S., or by a foreigner on board of a U. S. vessel; or by a citizen or foreigner on board a piratical vessel. *U. S. v. Furlong*, 5 Wheat. 152; *Ex parte Bollman & Swartwout*, 4 Cranch, 75; *U. S. v. Kessler*, 1 Baldwin, 20; *U. S. v. Peterson*, 1 W. & M. 306. But it is otherwise with acts of piracy committed by citizens of a foreign country in foreign vessels. *Ib.* *U. S. v. Palmer*, 3 Wheat. 632. See Wh. Cr. L. 8th ed. § 1860. All persons on board any vessel which throws off its national character by cruising piratically are indictable under the statute. *U. S. v. Furlong*, 5 Wheat. 183.

(g) This is sufficient in the United States. *U. S. v. Gibert*, 2 Sumner, 19. See *ante*, 17, etc. Wh. Cr. L. 8th ed. § 1867. *Infra*, 1977.

(h) This must be proved as laid. If the name of the ship be unknown, it must be stated so in the indictment.

Indies, then being, in and upon certain mariners, to the jurors aforesaid unknown, in the peace of God and of the said United States,⁽ⁱ⁾ then and there being, piratically and feloniously did make an assault, and them the said mariners in bodily fear,^(j) and danger of their lives, on the high seas aforesaid, then and there piratically and feloniously did put, and the said ship called the "Windsor Castle," and the apparel and tackle of the said ship, of the value of twelve hundred pounds, and seventy chests of opium, of the value of fourteen hundred pounds,^(k) in and on board the said ship then being, of the goods and chattels^(l) of certain citizens of the said United States, to the jurors aforesaid unknown, and then in the custody and possession of the mariners aforesaid, from the care, custody, and possession, and against the will of the mariners aforesaid, then, to wit, on the day and year last aforesaid, upon the high seas aforesaid, piratically, feloniously, and violently^(m) did steal, rob, take, and

(i) Some evidence must be given of this: for if the persons robbed be subjects of a state at enmity with this country, although it may perhaps be piracy, yet it is not cognizable as such in any court of admiralty. 4 Inst. 114. See *R. v. Sawyer*, R. & R. 294.

(j) This must be proved in the same manner as in robbery. Sir L. Jenk. XCIV. That the technical averments are essential, see Wh. Cr. Pl. & Pr. § 268.

(k) The things stolen are proven in the same manner as in ordinary cases of larceny. The value is immaterial, as in a robbery upon land. Molloy, 64, s. 18; Beawes, 231. It is said, that if one or more of the crew or passengers in a vessel be taken for the purpose of being sold as slaves, it is piracy. Molloy, 63, s. 16.

(l) These must be stated to be the goods of a subject or citizen of this country, or of some state in amity with it, and the allegation must be proved as laid.

(m) The goods must be proved to have been taken *animo furandi*, as in other cases of larceny. Molloy, 71, s. 33. And they must be proved to have been either taken with force and violence, or delivered to the pirates under the impression of that degree of fear and apprehension which is necessary to constitute robbery upon land. See *U. S. v. Baker*, 5 Blatch. 6.

The taking, to be piracy, must be without authority from any prince or state. If a party making a capture at sea do so by the authority of any prince or state, it cannot be considered piracy; for a nation never can be deemed pirates; fixed domain, public revenue, and a certain form of government, exempt a people from that character. Even a capture by the authority of the states of Algiers, Tunis, or Tripoli, cannot be treated as piracy. 2 Sir L. Jenk. 90; Grot. 2, c. 18, s. 2. At common law, if an English subject committed acts of hostility against another subject, under the authority of a commission from a foreign prince, it was not piracy (2 Sir L. Jenk. 751): but the law has been altered in this respect by 11 & 12 W. 3, c. 7, and 18 G. 2, c. 30, s. 1. See *R. v. Evans*, 2 East, P. C. 798.

If the subjects of the same state commit robbery upon each other, upon the high seas, it is piracy. If the subjects of different states commit robbery upon

carry away,⁽ⁿ⁾ against the peace, etc. (*Conclude as in book 1, chapter 3.*)^(o)

(1068) *Rioting on board ship.* (*Rev. Stat. § 5359.*)

That A. B., C. D., etc., heretofore, on, etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there master and commander, did then and there make a riot in and on board of the said called the they the said A. B., C. D., etc., then and there being of the crew of the said called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count. Endeavoring to revolt, etc., by rioting, etc.

That the said A. B., C. D., etc., heretofore, on, etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there master and commander, did then and there endeavor to make a revolt in and on board of said called the in this, that they the said did then and

each other upon the high seas, if their respective states be at amity, it is piracy; if at enmity, it is not: for it is a general rule, that enemies never can commit piracy on each other, their depredations being deemed mere acts of hostility. 1 Sir L. Jenk. 94; 4 Inst. 154. See Wh. Cr. L. 8th ed. § 310.

But if a commissioned ship, by mistake, capture a vessel belonging to the subject of a friendly power, imagining it to belong to an enemy, and bring it, without damage, into port for condemnation, that is not piracy. See 1 Sir L. Jenk. 94.

(n) This is proved in the same manner as in robbery. Molloy, 64, s. 18. If persons at sea force the captain of a vessel to sell part of his cargo for less than its value, it is piracy. 3 T. R. 713; see 28 H. 8, c. 15, s. 4. But if a pirate attack a vessel, and before he obtains possession of her, the captain, in order to redeem her, give an oath to pay a sum certain, that is no piracy, for there was no taking. Molloy, 64, s. 18. But if there be an actual taking, it is piracy, although the pirate afterwards allow the party to proceed on his voyage. Sir L. Jenk. 98.

(o) As to joinder of crimes, see Wh. Cr. L. 8th ed. § 1869. For piracy under 11 W. 3, see R. v. Jones, 11 Cox C. C. 393.

there, to wit, on board of said vessel, being a called the assemble with some other person or persons, to the jurors aforesaid unknown, then and there being of the crew and company of said called the in a tumultuous and mutinous manner, and did then and there make a riot in and on board of the said called the they the said then and there being of the crew of the said called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*) (For other forms see *supra*, 1062.)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1069) *Confining the master, etc.* (*Rev. Stat. § 5359.*)

That heretofore, to wit, on, etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the said United States of America, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, in and on board of a certain American vessel, being a called the whereof one G. H. was then and there the master and commander, did then and there unlawfully confine the said he the said then and there being the master and belonging to the company of said called the and they the said then and there being of the crew of the said called the against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)(*p*)

(1070) *Piratically and feloniously running away with a vessel, and aiding and abetting therein, etc., and assaulting master.*
First count, running away with vessel.(*q*)

That A. B., late of, etc., mariner, C. D., late of, etc., mariner, and E. F., late of, etc., mariner, heretofore, to wit, on, etc., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the United States of America, and within the jurisdiction of this court, (*r*) did piratically and feloniously

(*p*) For an indictment of this class, see *R. v. Jones*, 11 Cox C. C. 393.

(*q*) *United States v. Babe*, New York, 1844. The defendant was convicted and sentenced. See *U. S. v. Tully*, 1 Gallis. 247; *U. S. v. Kessler*, 1 Bald. 15; *Rev. Stat. § 5383*.

(*r*) This is a sufficient allegation of jurisdiction. *U. S. v. Gibert*, 2 Sumner, 19.

run away with a certain vessel, being a called the belonging and appertaining to a person (or persons) then being a citizen (or citizens) of the United States of America, but whose name is to the said jurors unknown, they the said A. B., C. D., and E. F., then and there being mariners of said vessel, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first count, substituting*): “belonging and appertaining to G. H., I. K., L. M., then being citizens (or a citizen) of the United States of America,” *for* “belonging and appertaining to a person then being a citizen of the United States of America, but whose name is to the said jurors unknown.”

(1071) *Third count. Running away with goods, etc.*

That A. B., C. D., etc., heretofore, to wit, on, etc., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the United States of America, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the belonging and appertaining to I. K., L. M., then being citizens (or a citizen) of the United States of America, they the said A. B., C. D., etc., being then and there mariners of said vessel, did then and there piratically and feloniously run away with the following goods and merchandise, to wit (*here particularize the articles and value of each*), in and on board the said vessel then being, of the goods and chattels of some person or persons to the jurors aforesaid unknown, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1072) *Fourth count. Same stated more specially.*

That A. B., etc., heretofore, to wit, on, etc., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States of America, and within the jurisdiction of this court, did piratically and feloniously run away with the following goods, wares, and merchandise, to wit (*here specify articles as in preceding count*), of the goods and chattels of all which goods, wares, and merchandise were then and there in and on board of a certain vessel, being a called

the owned by the said G. H., I. K., L. M., citizens of the United States of America, they the said G. H., I. K., L. M., etc., being then and there mariners of the said vessel, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

(*Same as fourth count, substituting*): “the following goods and merchandise, to wit (*here specify some of the wearing apparel, etc., of any of the officers or others*), of the goods and chattels of some person or persons to the said jurors unknown, all which said goods and merchandise were then and there in and on board of a certain vessel, being a called the owned in part by I. K., a citizen of the United States of America,” for “the following goods, wares, and merchandise, to wit (), of the goods and chattels of I. K., all which goods, wares, and merchandise were then and there in and on board a certain vessel, being a called the owned by the said citizen of the United States of America.”

(1073) *Sixth count. Assaulting master, and running away with goods, etc.*

That A. B., C. D., etc., heretofore, to wit, on, etc., with force and arms, upon the high seas, out of the jurisdiction of any particular state of the said United States of America, and within the jurisdiction of this court, in and on board of a certain vessel, being a called the owned by I. K., etc., citizens (or a citizen) of the said United States of America, then and there piratically and feloniously did assault one G. H., the said G. H. then and there being the master and commander of said and did then and there, upon the high seas aforesaid, in and on board of said called the out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, piratically and feloniously put the said G. H., being such master as aforesaid, in great bodily fear and danger of his life, and the said called the and the tackle and apparel of the said of the value of dollars, together with (*specify articles and value as in third count*), of the goods and chattels of R. S., T. V., etc., citizens of the United States of America (*here specify articles*

as in fifth count), all of which said goods, wares, and merchandise were then and there in and on board of said vessel (*or of the goods and chattels of some person or persons to the jurors aforesaid as yet unknown*), and then and there, upon the high seas aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, being under the care and custody and in the possession of the said G. H., being then and there the master and commander of said schooner as aforesaid, they the said A. B., C. D., etc., with force and arms, from the care, custody, and possession of the said then and there, to wit, upon the high seas aforesaid, in the place aforesaid, and within the jurisdiction aforesaid, piratically, feloniously, and against the will and consent of the said G. H., did steal, take, and run away with, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1074) *Seventh count. Against principal offender for running away with vessel.* (*Rev. Stat. § 5383.*)

That A. B. (*here insert the name of principal in the offence*), late of, etc., heretofore, on, etc., with force and arms, on the high seas, out of the jurisdiction of any particular state of the United States of America, within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, did piratically and feloniously run away with a certain other vessel, being a called the belonging and appertaining to I. K., a citizen (or citizens) of the United States of America, he the said A. B., then and there being a mariner of said vessel, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1075) *Eighth count. Against others as accessories.*

That W. B., late of, etc., mariner, and (*or if more, recite separately as before*) C. K., late of, etc., mariner, before the said piracy and felony was committed in form aforesaid, to wit, on, etc., on the high seas, out of the jurisdiction of any particular state of the said United States of America, and within the jurisdiction of this court, with force and arms, did unlawfully and feloniously, knowingly and wittingly aid and assist, procure, command, counsel and advise the said A. B., the piracy and felony

last aforesaid, in manner and form last aforesaid, to do and commit, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1076) *Breaking and boarding a ship, assaulting, etc., the crew, and stealing, etc., the cargo.(s)*

That J. P. (*and others, naming them*), of, etc., on, etc., upon the high seas, out of the jurisdiction of any particular state, did piratically and feloniously set upon, board, break, and enter a certain ship called the _____ then and there being a ship belonging to certain persons to the jurors aforesaid unknown, and then and there piratically and feloniously did make an assault in and upon certain persons whose names are to the jurors aforesaid unknown, being mariners in the same ship, and then and there piratically and feloniously did put the aforesaid persons, mariners of the same ship as aforesaid, and in the ship aforesaid then and there being, in personal fear and danger of their lives, then and there in the ship aforesaid, upon the high seas aforesaid, and out of the jurisdiction of any particular state as aforesaid; and piratically and feloniously did then and there steal, take, and carry away five hundred boxes of sugar, of the value of twenty thousand dollars (*here set forth all the articles stolen, with the value of each*), of the goods and chattels of certain persons to the jurors aforesaid unknown, then and there upon the high seas aforesaid, out of the jurisdiction of any particular state, being found in the aforesaid ship, in custody and possession of the said mariners of the said ship, from the said mariners in the said ship, and from their custody and possession then and there upon the high seas aforesaid, out of the jurisdiction of any particular state as aforesaid; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1077) *Piratically breaking into, taking, and carrying away a ship and certain goods on board the same.(t)*

That C. D., late of, etc., mariner (*and eight others, with the like*

(s) Davis's Pree. 227. This was the form in U. S. v. Palmer, 3 Wheat. 611.

(t) Lewis's Cr. Law, 645.

additions), on, etc., with force and arms, upon the high seas, out of the jurisdiction of any particular state, did piratically and feloniously set upon, board, break, and enter a certain merchant ship called the "Governor Strong," then being a ship belonging exclusively to citizens of the United States to the said jurors as yet unknown, and then and there piratically and feloniously did assault certain mariners whose names to the said jurors are also yet unknown, in the same ship and in the peace of the said United States then and there being; and did then and there, upon the high seas aforesaid, out of the jurisdiction of any particular state, piratically and feloniously put the said mariners in great fear and bodily danger of their lives; and the said merchant ship, and the apparel and tackle of the same, of the value of three thousand dollars, together with seventy chests of opium, of the value of five thousand dollars, then being in and on board the same ship, of the goods and chattels of certain citizens of the United States to the said jurors yet unknown; and then and there, upon the high seas aforesaid, out of the jurisdiction of any particular state, being under the care and custody and in the possession of the mariners aforesaid, they the said C. D. (*and others, naming them*), from the care, custody, and possession of the mariners aforesaid, then and there, to wit, upon the high seas aforesaid, out of the jurisdiction of any particular state, piratically, feloniously, and by force and violence and against the will of the mariners aforesaid, did steal, rob, take, and run away with; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1078) *Against a seaman for laying violent hands upon his commander, with intent to prevent his fighting in defence of his ship.*(u)

That A. B., of, etc., on, etc., on the high seas, out of the jurisdiction of any particular state, he the said A. B. then and there being a seaman on board of a certain ship called the belonging exclusively to certain citizens of the said United States to the jurors aforesaid yet unknown, in and upon the

(u) Davis's Prec. 225. See for notes *supra*, 1067.

body of one C. D., he the said C. D. then and there being the commander of the said ship called the on the high seas aforesaid, out of the jurisdiction of any particular state, feloniously and piratically did make an assault; and that the said A. B., being then and there such seaman as aforesaid, in and on board the ship aforesaid, feloniously and piratically did lay violent hands upon him the said C. D., commander of said ship as aforesaid, and the commander of him the said A. B. on board the same ship, with intent thereby piratically and feloniously to hinder and prevent him the said C. D., commander of said ship as aforesaid, from fighting in defence of his said ship, and of the said goods and chattels then, etc.

(1079) *Attempting to corrupt a seaman to turn marauder and to run away with a ship.*(v)

That J. P., late of, etc., mariner, on, etc., on the high seas, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, being then and there a seaman in and on board of a certain schooner called the "Concord," then and there belonging and appertaining to W. M., of the said district, mariner, and J. C., of the said district, merchant, both citizens of the said United States, of which schooner the said W. M. was also then and there master, did then and there, with force and arms, in and on board of the said schooner, upon the high seas, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, wilfully and unlawfully attempt and endeavor to corrupt a certain W. S., then and there being a mariner in and on board of the said schooner then and there being, to turn pirate, and then and there to run away with the said schooner and certain goods, wares, and merchandises then and there on board of the said schooner being, to wit, on the high seas, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(v) U. S. v. Paschal. Under this indictment, which was prepared by Mr. A. J. Dallas in 1810, the defendant was convicted and sentenced.

Second count—Revolt.

That he the said J. P., late of, etc., mariner, on, etc., on the high seas, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, then and there a seaman in and on board of a certain schooner called the "Concord" then and there being, which schooner then and there belonged and appertained to the said W. M., late of the said district, mariner, and J. C. aforesaid, late of the said district, merchant, both citizens of the said United States, and of which schooner the said W. M. was also then and there master, did then and there, with force and arms, in and on board of the said schooner, upon the high seas, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, wilfully and unlawfully endeavor to make a revolt in the said schooner, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1080) *Against an accessory to a piracy before the fact.*

(*Set forth the charge against the principal as in the preceding precedents, as the case may be, and then proceed as follows*): that E. F., of, etc., before the piracy and felony aforesaid was committed in manner and form aforesaid, to wit, on the said day of in the year aforesaid, on the high seas, out of the jurisdiction of any particular state, and within the jurisdiction of this court, did piratically and feloniously, knowingly and wittingly aid and assist, procure, command, counsel, and advise the said A. B. the piracy and felony aforesaid to do and commit. And the jurors aforesaid, upon their oath aforesaid, do further present, that the felony and piracy aforesaid, so as aforesaid done and committed by the said A. B., did affect the life of him the said A. B.; and that the said A. B. did do and commit the piracy and felony aforesaid, in manner aforesaid, upon the high seas, without the jurisdiction of any particular state, and within the jurisdiction of this court, upon and in pursuance of the aid, assistance, procurement, command, counsel, and advice aforesaid, of the said E. F., given and rendered as afore-

said to the said A. B. by him the said E. F.; against, etc., and contrary, etc.' (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1081) *Against an accessory to a piracy after the fact.*(x)

(*Set forth the charge against the principal as in the preceding precedents, as the case may be, and then proceed as follows*): That E. F., of, etc., afterwards, to wit, on, etc., on the high seas (*or on the land, if such be the fact, naming the place*), out of the jurisdiction of any particular state, and within the jurisdiction of this court, well knowing that the said A. B. had done and committed the felony and piracy aforesaid, did knowingly entertain and conceal the said A. B., and did knowingly receive and take into the custody of him the said E. F. the said vessel, goods, and chattels, which had been by the said A. B. piratically and feloniously taken as aforesaid, he the said E. F. then and there well knowing the same to have been piratically and feloniously taken as aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1082) *Fitting, equipping, and preparing and being concerned in fitting, etc., vessels for the slave-trade in ports of the United States, as master or owner, under the act of April 20th, 1818, §§ 2, 3; Rev. Stat. § 5378.*(y)

That C. F., late of, etc. (merchant, laborer, mariner, or otherwise), after the passing of the act of congress of the United States of America, entitled "An act in addition to 'An act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight,' and to repeal certain parts of the same," that is to say, after the twentieth day of April, in the year of our Lord one thousand eight hundred and eighteen, to wit, on, etc., in the year of at the port of in the district

(x) This and the prior form are from Davis's Prec. p. 226.

(y) U. S. v. Davis, U. S. Circuit Court, New York, 1846. The defendants were acquitted, but no exception was taken to the indictment. See Wh. Cr. L. 8th ed. § 1889. Form No. 1090 is more special.

of within the jurisdiction of the United States,^(z) and within the jurisdiction of this court, did for himself as master (he the said C. F. then and there being a citizen of the said United States) fit out,^(a) equip, load, and prepare a certain vessel, being a called the for the purpose of procuring, and with the intent to employ^(b) said in the trade and business of procuring, negroes, mulattoes, and persons of color, from some foreign kingdom, place, and country to the said jurors unknown, to be transported to some port and place to the said jurors unknown, to be held, sold, and otherwise disposed of as slaves, to be held to service and labor, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first count, substituting*): “from a foreign country, to wit, from the continent of Africa,” for “from some foreign kingdom, place, and country to the said jurors unknown.”

Third count.

(*Same as second count, substituting*): “owner” for “master.”

Fourth count.

(*Same as second count, substituting*): “did for some other person or persons to the said jurors unknown, as master,” for “did for himself as master.”

(1083) *Fifth count. Same as first, but leaving out allegation that offence was after the act, and averring defendant caused the vessel to sail.*

That the said C. F., heretofore, to wit, on, etc., in the port of a port or place within the jurisdiction of the said United States, and within the jurisdiction of this court, did for himself as master (he the said C. F. then and there being a citizen of the said United States), cause a certain ship and vessel, being a called the to sail from the port of a port and

(z) This is necessary. *U. S. v. Gooding*, 12 Wheat. 460; Wh. Cr. L. 8th ed. § 1890.

(a) The particulars of the fitting, etc., need not be specified. *U. S. v. Gooding*, 12 Wheat. 460.

(b) “With intent that said vessel *should be* employed,” is defective. The words in the text must be used

place within the jurisdiction of the said United States, for the purpose of procuring, and with the intent to employ said
 † in the trade and business of procuring, negroes, mulattoes, and persons of color, from some foreign kingdom, place, and country to the said jurors unknown, to be transported to some port and place to the said jurors also unknown, to be held, sold, and otherwise disposed of as slaves, and to be held to service and labor, contrary to the true intent and meaning of the act of congress of the United States of America, entitled “An act in addition to ‘An act to prohibit the introduction of slaves into any port or place within the jurisdiction of the United States, from and after the first day of January, in the year of our Lord one thousand eight hundred and eight,’ and to repeal certain parts of the same,” approved on twentieth of April, in the year of our Lord one thousand eight hundred and eighteen.

Sixth count.

(*Same as fifth count, substituting*): “from a foreign country, to wit, from the western coast of the continent of Africa,” for “from some foreign kingdom, place, and country to the said jurors unknown.”

Seventh count.

(*Same as fifth count, substituting*): “did as owner,” for “did for himself as master.”

Eighth count.

(*Same as sixth count, substituting*): “did as owner,” for “did for himself as master.”

Ninth count.

(*Same as fifth count, substituting*): “did as master, for some other person or persons to the jurors aforesaid as yet unknown,” for “did for himself as master.”

(1084) *Tenth count. Preparing the vessel, etc.*

That the said C. F., heretofore, to wit, on, etc., in the port of a port or place within the jurisdiction of the said United States, and within the jurisdiction of this court, did for himself as master of a certain ship or vessel, being a called the (he the said C. F. then and there being a citizen of the

said United States), prepare the said for the purpose of procuring, and with the intent to employ the said in the trade and business of procuring, negroes, mulattoes, and persons of color, from a foreign country, to wit, the continent of Africa, to be transported to some port and place to the said jurors unknown, to be sold as slaves, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Eleventh count.

(*Same as tenth count, substituting*): “did for some person or persons whose names are to the said jurors unknown, as master,” for “did for himself as master.”

Twelfth count.

(*Same as tenth count, substituting*): “did for himself as owner,” for “did for himself as master.”

(1085) *Thirteenth count. Aiding and abetting in preparing, etc.(c)*

That C. F., late of, etc., mariner, heretofore, to wit, on, etc., in the port of a port and place within the jurisdiction of the said United States, and within the jurisdiction of this court, did as master of a certain ship or vessel, being a called the

(he the said C. F. then and there being a citizen of the said United States), aid and abet in fitting, equipping, loading, and otherwise preparing the said for the purpose of employing the said called the (*proceed and conclude as in fifth count from †*).

Fourteenth count.

(*Same as thirteenth count, substituting*): “owner” for “master.”
(*For final count, see 17, 18, 181, n., 239, n.*)

(1086) *Serving on board of a vessel engaged in the slave-trade, under act of 10th May, 1800, §§ 2, 3, Rev. Stat. § 5381. First count, the vessel being American.*

That A. B., late of, etc., heretofore, to wit, on, etc., on the high seas, out of the jurisdiction of any particular state of the said

(c) It would even seem unnecessary under the statute, that there should appear on the record any principal offender to whom the defendant might be aiding or abetting. *U. S. v. Gooding*, 12 Wheat. 460.

United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, did voluntarily serve on board a certain vessel being a called the which said called the was then and there a vessel of the United States, and was then and there employed and made use of in the transportation of slaves from some foreign country or place to the said jurors unknown, he the said A. B. then and there being a citizen of the United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1087) *Second count, the vessel being foreign.*

That A. B., late of, etc., heretofore, to wit, on, etc., on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, did voluntarily serve on board of a certain vessel being a called the which said called the was then and there a foreign vessel, and was then and there employed in the slave-trade, he the said A. B. being then and there a citizen of the United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1088) *Third count. Same as first, stated more specially.*

That A. B., late of, etc., heretofore, to wit, from, etc., to, etc., and during all the time between the said days, on the high seas, out of the jurisdiction of any particular state of the said United States, on waters within the admiralty and maritime jurisdiction of the said United States, and within the jurisdiction of this court, did voluntarily serve on board of a certain vessel, being a called the which said called the was then and there a vessel of the United States, and was then and there employed and made use of in the transportation of slaves from some foreign country or place to the said jurors unknown, to some other foreign country or place to the said jurors also unknown, he the said A. B. being, during all the time aforesaid, a citizen of the United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

(Same as third count inserting): “a foreign vessel,” instead of “a vessel of the United States.”

(For final count, see 17, 18, 181, n., 239, n.)

(1059) *Another form for the same.(d)*

That on, etc., a certain schooner called the “Matilda” was a vessel of the said United States, and being so a vessel of the said United States, was unlawfully and voluntarily employed and made use of in the transportation and carrying of slaves from one foreign place to another, to wit, from the island of Bravo, in Africa, a foreign place, to the islands of St. Nicholas, Bonavista, Mayo, and St. Jago, all foreign places, in Africa aforesaid; and that J. S. H., late of the district aforesaid, mariner, a citizen of the said United States, then and there mate of the said schooner “Matilda,” did then and there, within the jurisdiction of this court, voluntarily and unlawfully serve in the capacity and station of mate aforesaid on board the said vessel, the same being then and there unlawfully and voluntarily employed and made use of in the transportation and carrying of slaves from one foreign place to another as aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(For final count, see 17, 18, 181, n., 239, n.)

(1090) *Fitting out slaver, etc.*

That P. II., after the twentieth day of April, in the year of our Lord one thousand eight hundred and eighteen, to wit, on, etc., and on divers days and times before and since said last mentioned day, and after the said twentieth day of April, in the year of, etc., with force and arms, upon the high seas, and without the jurisdiction of any particular state, but within the jurisdiction of the United States, did as master of or some other person whose name is to the jurors aforesaid as yet unknown, cause a certain vessel called the “Spitfire” to sail from a port within the jurisdiction of the United States, to wit, the

(d) On neither this nor the last indictment were the defendants tried. The first was prepared in New York and the latter in Philadelphia. See for offence generally, Wh. Cr. L. 8th ed. § 1889.

port of New Orleans, in the state of Louisiana, for the purpose and with the intent to employ said vessel in the trade and business of procuring negroes and persons of color from a foreign place or country, to wit, from that place and country called Africa, to be transported to a place or country called Cuba, to be held, sold, and otherwise disposed of as slaves, the said vessel called the "Spitfire" having, before her being caused to sail from said port of New Orleans as aforesaid, and after the said twentieth day of April, in the year, etc., to wit, on, etc., and on several days and times before and after the said last mentioned day, been fitted and equipped, loaded, and otherwise prepared by a person or persons, as owner or owners thereof, whose name or names are to the said jurors as yet unknown, in a port within the jurisdiction of the United States, to wit, the said port of New Orleans in the said state of Louisiana, for the purpose of procuring negroes or persons of color from a foreign place or country, to wit, from that place or country called Africa, to be transferred to a port in the place and country called the island of Cuba, to be sold and disposed of as slaves, against, etc. (*Conclude as in book 1, chapter 3.*)

That heretofore, and after the twentieth day of April, in the year, etc., a certain person commonly known and called by the name of D. J., otherwise called D. J. M., did for himself as owner, fit, equip, and otherwise prepare a certain vessel called the "Spitfire," in a port within the jurisdiction of the United States to, wit, the port of New Orleans, in the state of Louisiana, and did then and there cause the said vessel to sail and be sent away from the said port of New Orleans, for the purpose and with the intent of employing the said vessel in the trade and business of procuring negroes and persons of color from a foreign country, to wit, Africa, to be transported to a place and country called Cuba, to be held, sold, and disposed of as slaves, contrary to the form of the statute of the United States in such case made and provided; and that he the said P. II., with force and arms, on the high seas, without the jurisdiction of any particular state, and within the jurisdiction of the United States, on, etc., and on divers days and times after the day last mentioned, was aiding and abetting therein, and in causing the said vessel to sail and be sent away from the said port of New

Orleans, with intent and for the purpose to employ said vessel in the trade and business of procuring negroes and persons of color from a foreign country, to wit, Africa, to be transferred to said place called Cuba, to be held, sold, and disposed of as slaves, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1091) *Forcibly confining and detaining negroes taken from the coast of Africa with intention of making slaves of them, under act of 15th May, 1820, § 5, Rev. Stat. § 5375.*

That C. F. D., late of, etc., heretofore, to wit, on, etc., with force and arms, in, etc., on the coast of Africa, out of the jurisdiction of any particular state of the United States of America, on waters within the admiralty and maritime jurisdiction of this court, he the said then and there being * one of the ship's company of a certain vessel being a called the owned wholly or in part by a citizen or citizens of the United States of America, whose names are to the said jurors unknown, did * * piratically and feloniously, forcibly confine and detain negroes, whose names are to the said jurors also unknown, in and on board of the said vessel, being a called the with the intent of him the said C. F. D. to make slaves of the aforesaid negroes, they the said negroes not having been held to service by the laws of either of the states or territories of the said United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Like the first count, except instead of*): "owned wholly or in part by a citizen or citizens of the United States," etc., *insert*, "which said called the was then and there navigated for and in behalf of a citizen or citizens of the United States," etc.

Third count.

(*Same as first to *, and proceed*): "a citizen of the United States of America, and he the said then and there being one of the ship's company of a certain vessel, being a

called the which said vessel, being a called the
was then and there a foreign vessel, engaged in the slave-trade,
did," etc. (*here proceed and conclude as in first count, from ***).

(1092) *Fourth count. Same as first count; against a part of
defendants as principals and the others as accessories.*

That C. F. D., late of, etc., together with certain other persons
to the jurors aforesaid as yet unknown, heretofore, to wit, on,
etc., on the coast of Africa, out of the jurisdiction of any par-
ticular state of the said United States of America, on waters
within the admiralty and maritime jurisdiction of the said
United States, and within the jurisdiction of this court, they the
said persons to the jurors aforesaid as yet unknown, being of
the crew and ship's company of a certain vessel, being a
called the owned wholly or in part by a citizen or citizens
of the United States of America, whose names are to the said
jurors also unknown, did piratically and feloniously confine and
detain negroes, whose names are to the said jurors un-
known, in and on board of the said vessel, being a called the
the with the intent to make slaves of the aforesaid
negroes, they the said negroes not having been held to ser-
vice by the laws of either of the states or territories of the said
United States; and that the said C. F. D. was then and there
piratically and feloniously present, aiding and abetting the said
persons to the jurors aforesaid as yet unknown, in forcibly con-
fining and detaining the said negroes in and on board the
said vessel aforesaid, in the manner and at the time and place
last aforesaid, against, etc., and against, etc. (*Conclude as in book
1, chapter 3.*)

Fifth count.

(*Like the fourth count, except instead of*): "was then and there
piratically and feloniously present, aiding and abetting," *insert*,
"did then and there piratically and feloniously aid and abet the
said persons to the jurors aforesaid as yet unknown, in forcibly
confining and detaining in and on board said vessel the aforesaid
negroes."

Sixth count.

And so the jurors aforesaid, on their oath aforesaid, do say, that the said and the said persons to the jurors aforesaid as yet unknown, at the time and place last aforesaid, being of the crew and ship's company of the said vessel, being a called the owned wholly or in part by a citizen or citizens of the United States of America, whose names are to the said jurors unknown, did piratically and feloniously confine and detain the said negroes, whose names are to the aforesaid jurors unknown, in and on board of the said vessel, being a called the with the intent of them the said and the said persons to the jurors aforesaid as yet unknown, to make slaves of the aforesaid negroes, they the said negroes not having been held to service by the laws of either of the states or territories of the said United States, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1093) *Taking on board and receiving from Africa, negroes, etc., under act of 20th April, 1818, § 4, Rev. Stat. § 5375.(c)*

That B. M., late of, etc., heretofore, to wit, on, etc., with force and arms (in the harbor of on the coast of Africa), on waters within the admiralty and maritime jurisdiction of the United States, out of the jurisdiction of any particular state of the said United States, and within the jurisdiction of this court, he the said B. M. then and there being a citizen of the said United States of America, did take on board and receive negroes, whose names are to the said jurors unknown, in and on board of a certain vessel, being a called the from (the harbor of aforesaid, on the coast of Africa aforesaid), they the said negroes not being inhabitants of the said United States, nor held to service by the laws of either of the states or territories of the said United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(c) *United States v. Mansfield*, U. S. Circuit, New York, 1845. The defendant forfeited his recognizance and was never tried.

Second count.

(Same as first count, except inserting): "they the said negroes not being inhabitants of either of the states or territories of the said United States, and they the said negroes not having been held to service by the laws of either of the said states or territories of the said United States," instead of "they the said negroes not being inhabitants of the said United States."

Third count.

(Same as second count, inserting instead of): "did take on board and receive," etc., "did aid and abet in taking on board and receiving negroes, whose names are to the said jurors unknown, in and on board of a certain vessel, being a called the from aforesaid, to wit, from the coast of Africa aforesaid, they the said negroes not being inhabitants of, nor held to service by the laws of either of the states or territories of the United States."

Fourth count.

(Same as third count, except): "was then and there present aiding and abetting in taking on board and receiving."

(For final count, see 17, 18, 181, n., 239, n.)

(1094) *Forcibly bringing and carrying away negroes from the coast of Africa, for the purpose of making slaves of them, under act of 15th May, 1820, § 4, Rev. Stat. § 5376.*

That C. F. D., late of, etc., in the circuit and district aforesaid, heretofore, to wit, on, etc., with force and arms, at the on the coast of Africa, being a port or place within the admiralty and maritime jurisdiction of the United States of America, out of the jurisdiction of any particular state of the said United States of America, and within the jurisdiction of this court, he the said C. F. D., then and there being one of the ship's company of a certain vessel, being * a called the owned in whole or in part by a certain person or persons whose names

(f) *United States v. Driscoll*, New York, 1845. The defendant was not tried, having forfeited his recognizance.

are to the said jurors unknown, then and still being a citizen or citizens of the United States of America, did piratically and feloniously receive negroes, whose names are to the said jurors also unknown, in and on board of said vessel, being a called the at on the coast of Africa aforesaid, with the intent of him the said C. F. D. to make slaves of the aforesaid negroes, they the said negroes having been on, etc., seized on a foreign shore, to wit, at aforesaid, on the coast of Africa aforesaid, by some person or persons whose names are to the said jurors unknown, they the said negroes not having been held to service or labor by the laws of either of the states or territories of the United States, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first count, except*): “did piratically and feloniously, forcibly bring and carry negroes, whose names are to the said jurors also unknown, in and on board of said vessel, being a called the from the on the coast of Africa aforesaid, with the intent,” etc., *instead of* “did piratically and feloniously receive.”

Third count.

(*Same as first count down to*, and then proceed*): a citizen of the United States of America, and he the said C. F. D., being then and there one of the ship's company of a certain vessel, being a called the which said called the was then and there a foreign vessel engaged in the slave-trade, did piratically and feloniously receive negroes, whose names are to the said jurors unknown, in and on board of said foreign vessel, being a called the at the on the coast of Africa, with the intent of him the said C. F. D. to make slaves of the aforesaid negroes, they the said negroes having been on, etc., seized on a foreign shore, to wit, at aforesaid, on the coast of Africa aforesaid, by some person or persons whose names are the said jurors also unknown, they the said negroes not having been held to service or labor by the laws of either of the states or territories of the United

States, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

(*Same as third count, except*): “did piratically and feloniously, forcibly bring and carry negroes, whose names are to the said jurors unknown, in and on board of said foreign vessel, being a called the from the on the coast of Africa aforesaid, with the intent,” etc., *instead of* “did piratically and feloniously receive,” etc.

(*For final count, see 17, 18, 181, n., 239, n.*)

OFFENCES AGAINST SOCIETY.

CHAPTER XIV.

OFFENCES AGAINST THE POST-OFFICE LAWS AND REVENUE LAWS.

ROBBING AND OBSTRUCTING MAIL.

- (1095) Mail-robbery by putting the driver's life in jeopardy, etc., with dangerous weapons, and robbing from his personal custody certain bank bills, letters, and packets, to the jurors, etc., unknown.
- (1096) Another form for same. First count, robbing of the mail and putting in jeopardy with pistols.
- (1097) Obstructing the mail.

EMBEZZLING AND STEALING LETTER.

- (1098) Taking a letter out of the United States mail.
- (1099) Stealing from the mail of the United States.
 - First count. Stealing the mail.
- (1100) Second count. Stealing from the mail certain letters and packets.
- (1101) Third count. Taking letters from the mail and opening and embezzling them.
- (1102) Fourth count. Stealing a letter, specifying its contents, and by whom sent.
- (1103) Fifth count. Same without averment of contents.
- (1104) Another form for same, with counts for opening, etc. First count, stealing a letter and packet.
 - (1105) Second count. Same, stating route of mail.
 - (1106) Third count. Stating direction of letter.
 - (1107) Fourth count. Same, stating both route and direction of letter.
- (1108) Fifth count. Embezzling and destroying letter.
- (1109) Sixth, seventh, and eighth counts. For embezzling, etc., varying the statement of route and direction as in second, third, and fourth counts.
- (1110) Ninth count. Against person employed in post-office for opening, etc.
- (1111) Tenth count. Against carrier for embezzling and destroying letter.
- (1111a) Secreting and embezzling letters. Another form.

- (1112) Secreting and embezzling from the United States mail a letter containing money, the party being connected with a post-office, and the letter being directed to certain persons under the name of a firm.
 - (1112a) Against assistant postmaster for stealing, etc.
 - (1113) Embezzling, etc., averring specially the character and route of letter, etc.
 - (1114) Procuring and advising a person intrusted with the mail to secrete it.
 - (1115) Second count. Procuring and advising a person intrusted with the mail to secrete a particular letter.
 - (1115a) Against officer for opening or delaying letter under English statute.
 - (1115b) Against officer for stealing or embezzling letter under English statute.
 - (1115c) Retaining letters after delivery under English statute.
 - (1116) Smuggling, under § 19 of act of August 30, 1842 (tariff act). Peters's Statutes at Large, 565.
- (1095) *Mail robbery by putting the driver's life in jeopardy, etc., with dangerous weapons, and robbing from his personal custody certain bank bills, letters, and packets, to the jurors, etc., unknown.*(a)

That J. T. H., late of, etc., yeoman, together with a certain L. II. and a certain J. A., on, etc., in the night of the same day, in the public highway at H. county, at the district aforesaid, in and upon one D. B., then and there being the carrier of the mail of the said United States, and the person intrusted therewith, and in the peace of God and of the said United States then and there being, with force and arms, at the district aforesaid, feloniously did make an assault, and him the said D. B. in bodily fear and danger of his life, in the highway aforesaid, then and there did put, and with the use of certain dangerous weapons, to wit, pistols and dirks, which the said J. T. II. then and there in his hands held, he, the said J. T. II., did put in jeopardy the life of said D. B., he the said D. B. then and there being intrusted with and having the custody of the said mail * of the said United States, and the mail aforesaid, so intrusted and in the custody as aforesaid of said D. B., containing certain bank bills, letters, and packets to the jurors aforesaid unknown, belonging to certain persons to the jurors aforesaid unknown, from the personal cus-

(a) U. S. v. Hare, before Duval and Houston, JJ., 2 Wheel. C. C. 283; Rev. Stat. § 5472. See Wh. Cr. L. 8th ed. § 1823.

tody and care of the said D. B., and against his will, in the highway aforesaid, at the district aforesaid, then and there feloniously and violently did rob, steal, take, and carry away, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first to *, then proceed*): and the said mail of the said United States from the custody, possession, and care of said D. B., and against the will of said D. B., in the highway aforesaid, at the district aforesaid, did then and there feloniously and violently rob, steal, take, and carry away, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Same as first, omitting the qualification of*) “dangerous weapons,” (*and averring the robbery to be of the*): “said mail of the United States, then and there containing sundry letters,” etc.

(1096) *Another form for same. First count, robbing of the mail and putting in jeopardy with pistols.(b)*

That J. P., otherwise called J. M., late of, etc., yeoman, and G. W., late of, etc., yeoman, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, in and upon one S. M'C., in the peace of God and of the said United States of America then and there being, then and there being the carrier of the mail of the said United States, and then and there having the custody of the said mail, and then and there proceeding with said mail from the city of P. to the borough of R., feloniously did make an assault, and him the said carrier did then and there of the said mail feloniously rob, and in then and there effecting the said robbery did then and there, by the use of dangerous weapons, to wit, pistols, put in jeopardy the life of the said S. M'C., he the said S. M'C. then and there being as aforesaid the carrier of the said mail of the United States, and having then and there the custody thereof, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(b) U. S. v. Wilson, 1 Bald. 78. The defendants were convicted, and one of them executed. See Wh. Cr. L. 8th ed. § 1823.

Second count.

That the said J. P., otherwise called J. M., and the said G. W., afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, in and upon the said S. M'C. (then and there being a carrier of the mail of the United States), then and there having the custody of the said mail,* and then and there proceeding with the said mail from the city of P. to the borough of R., feloniously did make an assault, and him the said S. M'C. in bodily fear and danger of his life then and there feloniously did put, and the said mail of the United States from him the said S. M'C., then and there as aforesaid being a carrier of the mail of the United States, then and there having the custody thereof, then and there feloniously, violently, and against his will, did steal, take, and carry away; and in then and there effecting the robbery so as aforesaid described, did then and there, by the use of dangerous weapons, to wit, pistols, put in jeopardy the life of the said S. M'C., then and there being the carrier of the mail of the United States, and then and there having the custody thereof, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Same as first down to *, and then proceed*): feloniously did make an assault, and the life of him the said S. M'C., by the use of dangerous weapons, did then and there put in jeopardy, and the said mail of the United States from him the said S. M'C. then and there feloniously, violently, and against the will of him the said S. M'C., did steal, take, and carry away, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1097) *Obstructing the mail.(c)*

That W. M'C., late of, etc., yeoman, on, etc., at, etc., and within the jurisdiction of this court, with force and arms, knowingly

(c) The defendant was convicted and sentenced, on evidence showing that on the arrival of the cars containing the mail at the depot in Philadelphia, he drove his cab over the rails, and prevented the progress of the mail. U. S. v. M'Carran, Phil. 1847. The indictment was prepared by Mr. Pettit, then U. S. district attorney. See Rev. Stat. U. S. § 3995. I think the mode of obstructing should be averred.

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and wilfully did obstruct and retard the passage of the * mail of the United States, ** contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first, inserting at * the words*) “driver of the,” (*and at ** the words*) “conveying the same.”

Third count.

(*Same as second, inserting*) “carrier,” *in place of* “driver.”

Fourth count.

(*Same as first, inserting at * the words*) “carriage carrying the.”

(1098) *Taking a letter out of the United States mail.(d)*

That heretofore, to wit, on, etc., at, etc., and within the jurisdiction of this court, G. T., late of, etc., yeoman, did take out of the post-office, at, etc., a letter directed to a certain C. M., which had been in the said post-office, to wit, the post-office at P., and before the said letter had been delivered to the said person to whom it was so directed, with a design to obstruct the correspondence and to pry into business and secrets of another, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second and third counts, for embezzling, etc.

(1099) *Stealing from the mail of the United States. First count, stealing the mail.(e)*

That A. B., late of, etc., in, etc., heretofore, to wit, on, etc., with force and arms, in, etc., and within the jurisdiction of this court, did then and there feloniously steal the mail of the United States of America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(d) Rev. Stat. § 3892. See Wh. Cr. L. 8th ed. § 1827 *et seq.*

(e) U. S. v. Hoff. The defendant was convicted and sentenced. See Wh. Cr. L. 8th ed. § 1827 *et seq.*

(1100) *Second count. Stealing from the mail certain letters and packets.*

That A. B., late of, etc., heretofore, to wit, on, etc., with force and arms, at, etc., and within the jurisdiction of this court, did then and there feloniously steal and take from and out of a mail of the United States of America, certain letters(*f*) and packets (intended to be conveyed by post),(*g*) against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1101) *Third count. Taking letters from the mail and opening and embezzling them.*

That A. B., late of, etc., heretofore, to wit, on, etc., with force and arms, at, etc., in the southern district of New York, in the second circuit, and within the jurisdiction of this court, did then and there feloniously take the mail of the United States of America, and certain letters and packets therefrom (intended to be conveyed by post), and did open, embezzle, and destroy such mail, letters, and packets, the same containing articles of value, against, etc., and against, etc.(*h*) (*Conclude as in book 1, chapter 3.*)

(1102) *Fourth count. Stealing a letter, specifying its contents and by whom sent.*

That A. B., late of, etc., on, etc., at, etc., and within the jurisdiction of this court, a certain letter, then lately before put into a mail of the United States of America, at the post-office at, etc., in, etc., by C. D., and intended to be conveyed by mail from said to the post-office at, etc., for and to be delivered to E. F., at, etc., which said letter did then and there contain an article of value, to wit (*here specify the article, and value of the same*) (the property of certain persons to the jurors aforesaid unknown),(*i*) then and there, to wit, at, etc., and within the jurisdiction of this court, with force and arms, feloniously did steal and take from and out of a mail of the said United States of

(*f*) This is full enough, no particular description of the letter being necessary; though if the letter be particularly described, it must be proved as laid. U. S. v. Lancaster, 2 M'Lean, 431; U. S. v. Patterson, 6 M'Lean, 466.

(*g*) That this is necessary, see U. S. v. Okie, 5 Blatch. 516.

(*h*) It is sufficient if the indictment conform to the statute. U. S. v. Martin, 2 M'Lean, 256.

(*i*) As to this averment, see U. S. v. Poye, 1 Curtis's C. C. 369.

America, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1103) *Fifth count. Same as fourth, without averment of contents.*

That A. B., late of, etc., on, etc., with force and arms, at, etc., and within the jurisdictions of this court, did then and there feloniously take from and out of a mail of the United States a certain letter, then lately before, to wit, on, etc., put into a mail of the United States of America, at, etc., and within the jurisdiction of this court, which said letter was directed to E. F., at, etc. (and was intended to be conveyed by post), against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

That A. B., late of, etc., on, etc., with force and arms, at, etc., and within the jurisdiction of this court, did then and there feloniously take a certain letter directed to E. F., at, etc., said letter containing an article of value (the property of), from and out of a mail of the United States of America, and did open and embezzle said letter, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Seventh count.

That A. B., late of, etc., on, etc., with force and arms, at, etc., and within the jurisdiction of this court, did then and there feloniously take a certain letter directed to E. F., at, etc., said letter containing an article of value, to wit, a certain for the payment of and of the value of (the property of) from and out of the mail of the United States of America, and did then and there open and embezzle said letter, containing said article of value, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 27, n., 123, n.*)

(1104) *Another form for same, with counts for opening, etc. First count, stealing a letter and packet.(j)*

That heretofore, to wit, on, etc., at, etc., and within the juris-

(j) U. S. v. Kromer, Phil. 1836. This indictment was prepared by Mr. H. D. Gilpin, then district attorney. The defendant was convicted and sentenced. See Wh. Cr. L. 8th ed. § 1827 *et seq.*

diction of this court, W. K., of, etc., yeoman, * did then and there steal and take from and out of the mail of the United States a letter and packet (the property of C. S., intended to be conveyed by post), contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1105) *Second count. Same, stating route of mail.*

(*Same as first count to *, and then proceed*): “did then and there steal and take from and out of a mail, to wit, the mail of the United States, then and there proceeding from H., in the state of Pennsylvania, to wit, at, etc., towards D., in the state of P., to wit, at, etc., aforesaid, a letter and packet, contrary, etc., and against,” etc. (*Conclude as in book 1, chapter 3.*)

(1106) *Third count. Stating direction of letter.*

(*Same as first count to *, and then proceed*): “did then and there steal and take from and out of the mail of the United States a letter addressed to contrary, etc., and against,” etc. (*Conclude as in book 1, chapter 3.*)

(1107) *Fourth count. Same, stating both route and direction of letter.*

(*Same as first count to *, and then proceed*): “did then and there steal and take from and out of a mail, to wit, the mail of the United States, then and there proceeding from to wit, at, etc., towards to wit, at, etc., a certain other letter, to wit, a letter from J. L., addressed to contrary, etc., and against,” etc. (*Conclude as in book 1, chapter 3.*)

(1108) *Fifth count. Embezzling and destroying letter.*

(*Same as first count to *, and then proceed*): “did then and there embezzle and destroy a letter and packet, which had been in a post-office, before it was delivered to the person and persons to whom it was directed, contrary, etc., and against,” etc. (*Conclude as in book 1, chapter 3.*)

(1109) *Sixth, seventh, and eighth counts. For embezzling, etc., varying the statement of route and direction as in second, third, and fourth counts.*

(1110) *Ninth count. Against person employed in post-office for opening, etc.*

That afterwards, to wit, on, etc., at, etc., and within, etc., the said W. K., being then and there a person employed in a department of the post-office establishment, did then and there unlawfully open a letter with which he was then and there intrusted, and which had come to his possession, and which was intended to be conveyed by post, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1111) *Tenth count. Against carrier for embezzling and destroying letter.*

That afterwards, to wit, on, etc., at, etc., and within, etc., the said W. K., being then and there a person employed in a department of the post-office establishment,^(k) to wit, as a carrier^(l) of the mail of the United States from the post-office at H. to the post-office at D., to wit, at the district aforesaid, did embezzle and destroy a letter with which he was then and there intrusted, and which had then and there come to his possession, and was then and there intended to be conveyed by post, then and there containing a bank note, to wit a bank note of the bank of Pennsylvania for one hundred dollars, marked with the letter S. and numbered No. 162; contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1111a) *Secreting and embezzling letter. Another form.*

That (the defendant), on, etc., at, etc., did secrete and embezzle a certain letter, then and there directed to S. E. D., etc., in the words and letters following, "Miss Sarah E. Dalzell, Ellsworth, Maine," with which he was then and there intrusted, and which had come to his possession, and was then and there intended to be conveyed by post, containing a certain bank note for the payment of two dollars, he the said L., at the time, etc., being then and there employed in one of the departments of the post-office establishment, to wit, being a clerk, etc.^(m) (*Conclude as in book 1, chapter 3.*)

(k) U. S. v. Patterson, 6 M'Lean, C. C. R. 466.

(l) A carrier is within the act. U. S. v. Belew, 2 Brock. 280.

(m) A second count described the bank note, and alleged that it was of the value of two dollars, and that the letter came into the possession of the defendant

(1112) *Secreting and embezzling from the United States mail a letter containing money, the party being connected with a post-office, and the letter being directed to certain persons under the name of a firm.*(n)

That J. W., late of, etc., on, etc., was a person employed in one of the departments of the post-office establishment of the said United States,(o) to wit, a clerk (or otherwise), in the post-office at(p) in the district aforesaid, and that on, etc., in the said post-office at, etc., a certain letter,(q) then lately before sent by one C. D., of, etc., and intended to be conveyed by post to certain persons using trade and commerce in the city of in said southern district of New York, under the name, style, and firm of and which said letter contained (*state the contents of said letter, and the value*),(r) came into the possession of him the said J. W., so then and there being employed as a clerk in the said post-office at aforesaid, and that, he the said J. W. being so employed in the said post-office, and the said letter so then and there containing the said having so as aforesaid come into the possession of him the said J. W., he the said J. W. did then and there, with force and arms, on, etc., at, etc., feloniously secrete the said letter, so then and there containing

“so then and there employed as a clerk in the said post-office,” and that the letter with the said article of value having so come into his possession, he did then and there secrete and embezzle the letter then and there containing the said article of value. It was held that in an indictment of this class it is not necessary to allege that the letter or note was the property of any one. It was further held that if the letter was inclosed in an envelope, and the envelope was directed to A. B., the letter is well described as directed to A. B. The indictment, it was ruled, need not allege that the clerk obtained the letter by virtue of his employment; it is enough that, being a clerk, he has obtained possession of the letter. Nor is it necessary to set out the places from and to which the letter was to be carried by post. U. S. v. Laws, 2 Lowell, 115.

(n) U. S. v. Wisner, New York, 1844. The defendant was convicted. See, for a similar form, *supra*, 445, and see Wh. Cr. L. 8th ed. § 1827 *et seq.*

(o) This is enough. U. S. v. Patterson, 6 M'Lean, C. C. R. 466.

(p) The “employment” must be distinctly alleged. U. S. v. Nott, 1 M'Lean, 499.

(q) Though it may be prudent to describe the letter with the particularity that follows, yet it would seem to be enough to aver that it came into the hands of the postmaster, without stating where it was mailed or by what route it was conveyed. U. S. v. Lancaster, 2 M'Lean, 431; U. S. v. Martin, *Ib.* 256.

(r) Neither the letter nor the notes inclosed in it need be specifically described, though if they are, a variance may be fatal. U. S. v. Lancaster, 2 M'Lean, 431.

the said contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Like first count, substituting*): “feloniously embezzle the said letter,” etc., for “feloniously secrete the said letter.”

Third count.

(*Like first count, substituting*): “feloniously secrete(s) and embezzle the said letter,” for “feloniously secrete the said letter.”

Fourth count.

(*Like first count, except instead of*): “he the said J. W. did then and there, with force and arms, on, etc., at, etc., feloniously secrete the said letter, so then and there containing the said ,” insert, “he the said J. W. the said of the value aforesaid, with force and arms, feloniously did steal out of the aforesaid letter.”

Fifth count.

(*Like fourth count, except instead of*): “feloniously did steal,” etc., insert, “feloniously did take.”

Sixth count.

(*Like fifth count, except instead of*): “feloniously did take,” insert, “feloniously did steal and take.”

(1112a) *Against an assistant postmaster for stealing money which came into his hands as assistant postmaster.*(t) See *Gordon's Digest*, art. 3611, p. 704. *Rev. Stat.* § 5467.

That A. M., etc., on, etc., at, etc., he the said A. M. being then and there a person employed in one of the departments of the postal service of the United States of America, to wit, as an assistant of the deputy-postmaster of the post-office, legally established and appointed by the postmaster-general of the

(s) This is correct. *U. S. v. Sander*, 6 M'Lean, C. C. R. 598.

(t) This indictment, with some modifications, is taken from one given by Mr. Davis in his *Precedents*, p. 149, as drawn by Professor Ashmun of the Law School in Cambridge. The case was twice tried without obtaining a verdict.

United States, within the said town of Granby, feloniously did steal, take, and carry away sundry bank notes, amounting together to the sum of two hundred and seventy dollars, and of the value of two hundred and seventy dollars, of the goods, chattels, and property of one N. P. and one C. D.; which said bank notes were then and there feloniously taken and stolen as aforesaid by the said A. M. out of a certain letter, which came to the hands and possession of him the said A. M. in his said capacity and employment as such assistant postmaster as aforesaid, against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1113) *Seventh count. For embezzling, etc., averring specially the character and route of letter, etc.*

That on, etc., one A. B., of, etc., deposited in the post-office of the said United States at aforesaid, a certain letter addressed and directed to C. D., at, etc., by the name and description of (*repeat the name of the firm, if such is the case*), being the name, style, and firm under which the said on, etc., used trade and commerce and transacted commercial business in the said city of which said letter then and there contained (*state the contents*), which said letter so as aforesaid containing the said was intended to be conveyed by post to the city of in the district aforesaid, to the said C. D., so as aforesaid using trade and commerce under the name, style, and firm of C. D. at the said city of

And the jurors aforesaid, on their oath aforesaid, do further present, that afterwards, to wit, on, etc., the said letter, so containing the said and so intended to be conveyed by post, came into the possession of A. M., of, etc., the said A. M., on, etc., at, etc., being a person employed in one of the departments of the postal service of the said United States of America, to wit, being a person employed as a clerk in the post-office of the said United States at, etc., and that he the said A. M., being then and there so employed as aforesaid, and the said letter containing the said so intended to be conveyed by post, having then and there come into the possession of him the said A. M., he the said A. M. did then and there, with force and arms, feloniously embezzle the said letter, so containing the said

against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Eighth count.

(*Like seventh count, except instead of*): “with force and arms, feloniously embezzle the said letter, so containing the said
,” *insert*, “with force and arms, feloniously steal and take the said of the value aforesaid, out of the aforesaid letter.”

Ninth count.

(*Like eighth count, except instead of*): “with force and arms, feloniously steal and take the said of the value aforesaid, out of the aforesaid letter,” *insert*, “with force and arms, feloniously secrete the said letter, so containing the said of the value aforesaid.”

(1114) *Procuring and advising a person intrusted with the mail to secrete it.*(u)

That J. B. M., etc., did at, etc., on, etc., procure, advise, and assist J. J. S. to secrete, embezzle, and destroy a mail of letters, with which the said J. J. S. was intrusted, and which had come to his possession, and was intended to be conveyed by post from in the district aforesaid, to also in said district, containing bank notes, the said J. J. S. being at the time of such procuring, advising, and assisting, then and there a person employed in one of the departments of the postal service, to wit, a carrier of the mail of the United States from aforesaid, to aforesaid, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1115) *Second count. Procuring and advising a person intrusted with the mail to secrete a particular letter.*

That the said J. B. M. did procure, advise, and assist J. J. S. to secrete, embezzle, and destroy a letter addressed by J. S. to J. B., with which the said J. J. S. was intrusted, and which came to his possession, and was intended to be conveyed by post from in the district aforesaid, to aforesaid, containing sundry bank notes, amounting in the whole to sixty dollars, of a denomination to the jurors aforesaid unknown, and of the issue

(u) *United States v. Mills*, 7 Peters, 138. See Rev. Stat. § 5467, to which the form in the text should be adapted.

of a bank to the said jurors also unknown, the said J. J. S. being at the time of such procuring, advising, and assisting, then and there a person employed in one of the departments of the postal service, to wit, a carrier of the mail of the United States from aforesaid, to aforesaid, contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1115a) *Against officer of post-office for opening or delaying letters, under English statute.*

That J. S., on, etc., at, etc., being then a person employed by and under the post-office of the United Kingdom, did unlawfully and contrary to his duty open (or procure, or suffer to be opened; or unlawfully and wilfully detain) a post-letter, the property of the postmaster general; against, etc.(v) (*Conclude as in book 1, chapter 3.*)

(1115b) *Against officer of the post-office for stealing or embezzling letters, under English statute.*

That J. S., etc., being then a person employed by and under the post-office of the United Kingdom, at, etc., feloniously did steal, take, and carry away (or feloniously did embezzle, or secrete, or destroy) one post-letter, the property of the postmaster general, containing therein one bill of exchange (*describing security*) for the payment of ten pounds, the property of the postmaster general, against, etc.(w) (*Conclude as in book 1, chapter 3.*)

(1115c) *Retaining letters after delivery, under English statute.*

(*Commencement as in prior forms*)—unlawfully and fraudulently did retain a certain post-letter, the property of the postmaster general, which ought to have been delivered to a certain other person, to wit, one J. N., against, etc.(x) (*Conclude as in book 1, chapter 3.*)

(v) Arch. C. P. 19th ed. p. 416; citing *R. v. Rees*, 6 C. & P. 606; *R. v. Reeson*, Dears. 226; *R. v. Glass*, 2 C. & K. 395.

(w) Arch. C. P. 19th ed. p. 417. Decoy letters are within the statute. *R. v. Young*, 1 Den. 194; 2 C. & K. 466.

(x) Arch. C. P. 19th ed. p. 421. This is under a statute meant to cover the case of *R. v. Mucklow*, 1 Mood. C. C. 160.

(1116) *Smuggling, under § 19 of act of August 30, 1842—(tariff act)—Peters's Statutes at Large, 565.(y)*

That B. L., late of, etc., heretofore, to wit, on, etc., at, etc., and within, etc. (*or otherwise*), knowingly and wilfully, with intent to defraud the revenue of the United States of America, did (smuggle and) clandestinely introduce into the United States of America, to wit, into the port and district of, etc., in the circuit and district aforesaid, and within the jurisdiction of this court,† certain goods, wares, and merchandise, * subject to duty by law, and which should have been invoiced, without paying or accounting for the duty due and payable on said goods, wares, and merchandise, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first count to *, and then proceed*): to wit (*specify the articles, marks, and quantities particularly*), of the value of dollars, all of which said goods, wares, and merchandise were subject to duty by law, and which should have been invoiced, without paying or accounting for the duty to which said goods, wares, and merchandise were so subject as aforesaid, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Like second count, except instead of*): “all of which said goods, wares, and merchandise were subject,” etc., *insert*, “which said goods, wares, and merchandise so smuggled as aforesaid, were then and there, by the laws of the United States of America, subject to duty, and should have been invoiced, he the said B. L., at the time he so smuggled the said goods, wares, and merchandise as aforesaid, not having paid or accounted for the duty to which the said goods, wares, and merchandise were subject as aforesaid,” against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count. Like the first count, omitting the words in brackets.

(y) *United States v. Loewi*, New York, 1850. The defendant was acquitted, but no question was raised on this indictment. It would, however, be inadequate under Rev. Stat. § 5445.

Fifth count.

That B. L., late of, etc., heretofore, to wit, on, etc., at, etc., knowingly and wilfully, with intent to defraud the revenue of the United States of America, did smuggle and clandestinely introduce into the United States, to wit, into the city of New York, in the southern district of New York, and within the jurisdiction of this court, certain goods, wares, and merchandise, to wit (*as is specified in preceding counts*), of the value of dollars, which said goods, wares, and merchandise, so smuggled and clandestinely introduced into the United States of America as aforesaid, were subject to duty by law and should have been invoiced, he the said B. L., at the time he so smuggled and clandestinely introduced the said goods, wares, and merchandise as aforesaid, well knowing that the duty due and payable upon said goods, wares, and merchandise had not been paid or accounted for, and he the said B. L., at the time he so smuggled and clandestinely introduced the said goods, wares, and merchandise as aforesaid, well knowing that the said goods, wares, and merchandise had not been invoiced, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

(*Same as first count to †, and then proceed*): in a certain vessel, being a called the certain goods, wares, and merchandise, to wit (*here specify articles, etc., as in second count*), of the value of which said goods, wares, and merchandise, so smuggled and clandestinely introduced into the United States of America as aforesaid, were unladen from said called the without any permit from the collector and naval officer of the port and district of the city of New York for such unloading, he the said B. L., at the time he so smuggled and clandestinely introduced said goods, wares, and merchandise as aforesaid, and at the time said goods, wares, and merchandise were unladen without a permit as aforesaid, not having paid or accounted for the duty to which said goods, wares, and merchandise were subject as aforesaid, and the duty to which said goods, wares, and merchandise were subject as aforesaid not being paid or accounted for by any person or persons whatsoever, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

CHAPTER XV.

TREASON, SEDITION, AND VIOLATION OF THE NEUTRALITY LAWS. (a)

- (1117) Levying war against the United States, with overt acts: the first charging levying war generally; the second, resisting the execution of a particular law by preventing the marshal from serving process; and the third, resisting the same by rescuing prisoners taken by the marshal.
- (1118) Another form for same.
- (1119) Traitorously adhering to, and giving aid and comfort to the enemies of the United States.
- (1120) Aiding and comforting the enemy, with overt acts specially pleaded, consisting of sending provisions in a vessel to one of the enemy's vessels.
- (1121) Illegal outfit of vessel, etc., against a foreign nation, etc.
- (1122) Beginning, setting on foot, providing, and preparing the means of a military enterprise or expedition, against the territory or dominions of a foreign prince.
- (1123) Enlisting soldiers in the United States, in the service of a foreign prince.
- (1124) Conspiracy to impede the operation of certain acts of congress.
First count. Conspiracy alone.
- (1125) Second count. Overt act; rioting, etc.
- (1126) Third count. Rescue of person under custody of marshal.
- (1127) Conspiracy to raise an insurrection against the United States.
First count, by advising the people to resist the execution of the excise law.
- (1128) Second count. Setting up a liberty pole for the purpose of inciting the people to sedition.
- (1129) Conspiracy to assemble a seditious meeting. First count.
- (1130) Conspiracy to raise an insurrection and obstruct the laws. First count.
- (1131) Levying war against the State of Massachusetts.
- (1132) Conspiring to excite an insurrection against, and to subvert the government of the State of Rhode Island, with overt act, consisting of attempt to usurp the place of member of the legislature, etc.

(a) Wh. Cr. L. 8th ed. §§ 1782 *et seq.*

- (1133) Treason against a state before the federal constitution. Overt act, taking a commission from the British government in 1778.
- (1134) Misdemeanor in going into the city of Philadelphia while in possession of the British army.
- (1135) Enticing United States soldiers to desert.
- (1136) Against a deserter and the person harboring him.
- (1137) Supplying unwholesome bread to prisoners of war.

(1117) *Levying war against the United States, with overt acts: the first charging levying war generally; the second resisting the execution of a particular law by preventing the marshal from serving process; and the third, resisting the same by rescuing prisoners taken by the marshal.*(b)

That J. F.,(c) late of the county of Bucks, in the state and district of Pennsylvania, yeoman, etc., owing allegiance(d) to the United States of America, wickedly devising and intending the peace and tranquillity of the said United States to disturb, and to prevent the execution of the laws thereof within the same, to wit, a law of the said United States, entitled an act, etc., and also a law of the said United States, entitled an act, etc., on, etc., in the state and district aforesaid,(e) and within the jurisdiction of this court, wickedly and traitorously(f) did(g) intend to levy

(b) The indictment against John Fries, on which he was originally tried and convicted before Judge Iredell and Judge Peters, in 1799, contained but one overt act, viz., the first one in the present form. See Davis's Prec. 256. A new trial was granted, and before the second venire issued, Mr. Rawle, then district attorney, moved to quash the first indictment, which being done, the one in the text was substituted. 1 Wh. St. Tr. 666; Wh. Cr. L. 8th ed. §§ 1796, 1808, 1809.

(c) Under the constitutional limitation it has been doubted whether, in the United States, the common law principle that all are principals in treason is applicable (U. S. v. Burr, 4 Cranch, 472, 501); but it appears that the common law is unaltered as regards the individual states. Davis's Va. Crim. Law, 38; Wh. Cr. L. 8th ed. § 1792.

(d) "If any person or persons, owing allegiance to the United States of America, shall levy war against them," etc., "he shall," etc. Act of April 30th, 1790, § 1. Under this section the averment in the text is essential.

(e) Though the venire must be put in a county where an overt act can be proved, yet the proof of one overt act will entitle the prosecution to introduce additional overt acts of the same species in other counties. 2 Chit. C. L. 63; 1 East, P. C. 125; 4 East, R. 171; Fost. 9.

(f) This word is essential, being the distinguishing qualification of the offence. 2 Ld. Raym. 870; Comb. 259; 1 East, P. C. 115; Wh. Cr. Pl. & Pr. § 257.

(g) The usual form is "did compass, imagine, and intend" (2 Chit. C. L. 68; see form No. 1118, 1119), though "intend" is enough.

war(h) against the said United States within the same, and to fulfil and bring to effect the said traitorous intention of him the said J. F., afterwards, that is to say, on, etc.,(i) in the said state, district, and county aforesaid, and within the jurisdiction of this court,(j) with a great multitude of persons whose names are to the said grand inquest unknown, to a great number, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled, did traitorously assemble and combine against the said United States, and then and there, with force and arms, wickedly and traitorously, and with the wicked and traitorous intention to oppose and prevent, by means of intimidation and violence, the execution of the said laws of the said United States within the same, did array and dispose themselves in a warlike and hostile manner against the said United States,(k) and then and there, with force in pursuance of such their traitorous intention, he the said J. F., with the said persons so as aforesaid traitorously assembled, armed, and arrayed in manner aforesaid, wickedly and traitorously did levy war(l) against the said United States.

(h) See *infra*, note (l), also 1118-9.

(i) The same laxity is allowed in pleading time to an overt act, as in pleading time in other cases (*supra*, notes to form 2, etc.), though of course overt acts should be laid as committed subsequently to the intending of the treason. Formerly the several overt acts were laid at distinct times, but this, it seems, is unnecessary. 1 East, P. C. 125; Fost. 8, 9, 194; 1 Hale, 122; 2 Chit. C. L. 66.

(j) Any number of overt acts may be introduced, and either of them, like the several assignments in perjury or false pretences, will be enough by itself to support a conviction. 1 East, P. C. 123; 2 Chit. C. L. 66. But an overt act must be specially laid. Burr's Trial, 400; Muleahy v. R., L. R. 3 H. L. 306. An overt act which is defectively laid may be rejected as surplusage when another overt act is sufficiently pleaded. Muleahy v. R., L. R. 3 H. L. 306.

One species of treason may be laid and proved as an overt act of another (1 East, P. C. 62, 117), and therefore it is usual to insert in the indictment one count for "levying war," showing the overt acts, and then to add a second "for adhering to the enemies of the United States," and repeating the same overt acts. 2 Chit. C. L. 64; see *Ib.* for precedents, 73 and 74. But it seems that no overt act can be given in evidence under any branch of treason, unless it be expressly laid as an overt act of such treason, although it be laid as an overt act of some other treason in the same indictment. 2 East, P. C. 117.

Two witnesses of an overt act are not absolutely necessary to authorize the grand jury to find a bill (1 Burr's Trial, 196), though the contrary opinion was expressed on Fries's trial. *Ib.* p. 14.

(k) This manner of charging the hostile assemblage is approved in East, P. C. 58, 116; 2 East, R. 11; 1 Hale ed. by Stokes and Ing. 150; 2 Chit. C. L. 64.

(l) To say nakedly that the defendant "levied war," is not enough in Eng-

(And(m) further to fulfil and bring to effect the said traitorous intention of him the said J. F., and in pursuance and in execution of the said wicked intention and traitorous combination to oppose, resist, and prevent the said laws of the said United States from being carried into execution in the state and district aforesaid, he the said J. F., afterwards, to wit, on, etc., in the state, district, and county aforesaid, and within the jurisdiction of this court, with the said persons, whose names to the grand inquest aforesaid are unknown, did wickedly and traitorously assemble against the said United States, with the avowed intention, by force of arms and intimidation, to prevent the execution of the said laws of the said United States within the same, and in pursuance and execution of such their wicked and traitorous combination and intention, he the said J. F., then and there, with force and arms, with the said persons, to a great number, to wit, the number of one hundred persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons, as well offensive as defensive, being then and there unlawfully and traitorously assembled), did wickedly and traitorously resist and oppose the marshal of the said United States, in and for the said Pennsylvania district, in the execution of the duty of his office of marshal aforesaid, and then and there, with force and arms, with the said great multitude of persons, so as aforesaid unlawfully and traitorously assembled and armed and arrayed in manner aforesaid, he the said J. F., wickedly and traitorously, did oppose and resist and prevent the said marshal of the said United States from executing the lawful process to him directed and delivered against sundry persons, inhabitants of the county aforesaid and district aforesaid,

land (1 East, P. C. 116-17; Wh. Cr. L. 8th ed. § 1806; Carlisle's case, 1 Dall. 35), nor under the constitution and act of congress is it probable the law would be considered as different. The practice, as will be seen, has always been to introduce overt acts, or at all events to introduce a specification of what the overt acts consisted in. Still, as levying war is an overt act by itself, no other overt act need be alleged, where it is charged that what was done by the defendant was done in a warlike manner. 2 Chit. C. L. 65.

The substance of traitorous writings and other communications is all that need be given. Wh. Cr. L. 8th ed. § 1806.

(m) It is sufficient, in stating several overt acts, to couple them together by an "and" without repeating, "and the jury further present," etc., or the like, but that form is the proper one in laying distinct species of treason. 1 East, P. C. 116. See Holt, 686-7; 4 Harg. St. Tr. 702.

and charged upon oath, before the judge of the district court of the said United States for the said district, with having entered into a conspiracy to prevent the execution of the said law of the United States, entitled an act, etc., which process duly issued by the said judge of the said district court of the district aforesaid, the said marshal of the said United States then and there had in his possession, and was then and there proceeding to execute, as by law he was bound to do; and so the said grand inquest, upon their respective oaths and affirmations aforesaid, do say, that the said J. F., in manner aforesaid, as much as in him lay, wickedly and traitorously, did prevent, by means of force and intimidation, the execution of the said law of the said United States, in the said state and district of Pennsylvania.

(Repeat passage as in brackets, and then proceed): did traitorously, with force and arms, and against the will of the said marshal of the said United States in and for the district aforesaid, liberate and take out of his custody sundry persons by him before that time arrested, and in his lawful custody then and there being, by virtue of lawful process against them issued by the said judge of the district court of the said United States for the said Pennsylvania district, on a charge upon oath of a conspiracy to prevent the execution of the said law of the said United States, entitled an act, etc.; and so the grand inquest aforesaid, upon their respective oaths and affirmations aforesaid, do say, that the said J. F., as much as in him lay, did then and there, in pursuance and in execution of the said wicked and traitorous combination and intention, wickedly and traitorously, by means of force and intimidation, prevent the execution of the said law of the said United States, entitled an act, etc., and the said law of the said United States, entitled an act, etc., in the state and district aforesaid, contrary to the duty of his said allegiance,⁽ⁿ⁾ against, etc., and also against, etc. (Conclude as in book 1, chapter 3.)

(For final count, see 17, 18, 181, n., 239, n.)

(n) This conclusion has been held indispensable. 1 East, P. C. 115; 2 Chit. C. L. 63. Under the Act of April 30th, 1790, § 1, as has been noticed, there must be somewhere in the indictment the express allegation that the defendant owed allegiance to the United States of America, and the practice is not only to charge such allegiance in the body of the indictment, but to aver the defendant to have offended against it in the conclusion.

(1118) *Another form for same.(o)*

That A. B., late of, etc., attorney at law, being an inhabitant of and resident within the United States, and under the protection of the laws of the United States, and owing allegiance and fidelity to the said United States, not weighing the duty of his said allegiance, but wickedly devising and intending the peace and tranquillity of the said United States to disturb, and to stir, move, and excite insurrection, rebellion, and war against the said United States, on, etc., at, etc., and within the jurisdiction of this court, unlawfully, falsely, maliciously, and traitorously did compass, imagine, and intend to raise and levy war, insurrection, and rebellion against the said United States; and in order to fulfil and bring to effect the said traitorous compassings, imaginations, and intentions of him the said A. B., afterwards, to wit, on, etc., at, etc., and within the jurisdiction of this court, with a great multitude of persons (whose names to the grand inquest aforesaid are at present unknown), to the number of thirty persons and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, dirks, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely and traitorously join and assemble themselves together against the said United States, and then and there, with force and arms, did falsely and traitorously, and in a hostile and warlike manner, array and dispose themselves against the said United States; and then and there, on, etc., at, etc., and within the jurisdiction of this court, in pursuance of such their traitorous intentions and purposes aforesaid, he the said A. B., with the said persons so as aforesaid traitorously assembled, armed, and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said United States, contrary to the duty of the allegiance and fidelity of the said A. B., against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count see 17, 18, 181, n., 239, n.*)

(o) Davis's Prec. 251. This is the indictment in Burr's case, and is taken from the proceedings transmitted to congress. The superfluous matter, copied from the obsolete English forms, is here omitted. See 4 Cranch, 471-488, for an exposition of the law of treason against the United States.

(1119) *Traitorously adhering to, and giving aid and comfort to the enemies of the United States.*(p)

That on, etc., and long before, and continually from thence hitherto, an open and public war was and yet is prosecuted and carried on between the United States of America and the persons exercising the powers of government in France; and that A. B., late of, etc., a citizen of the said United States, well knowing the premises, but not regarding the duty of his allegiance, but as a traitor against the said United States, and wholly withdrawing the allegiance, fidelity, and obedience which every citizen of the said United States of right ought to bear towards the government and people thereof, and conspiring, contriving, and intending by all the means in his power, to aid and assist the persons exercising the powers of government in France, and being enemies of the said United States,(q) in the prosecution of the said war against the said United States, heretofore, and during the said war, to wit, on, etc., aforesaid, and on divers other days and times, as well before as after that day, with force and arms, at, etc., maliciously and traitorously did adhere to, and give aid and comfort to the said persons exercising the said powers of government in France, then being enemies of the said government of the said United States; and that in the prosecution, performance, and execution of his the said A. B.'s treason and traitorous adhering aforesaid, and to fulfil, perfect, and bring the same to effect, he the said A. B., as such traitor as aforesaid, during the said war, to wit, on, etc., aforesaid, and on divers other days and times, as well before as after that day, at, etc., with force and arms, maliciously and traitorously, did(r) conspire, consult, consent, and agree with one J. H. I., one W. J., and divers other false traitors, whose names are to the jurors aforesaid unknown, to aid and assist, and to seduce and procure others, citizens of the said United States, to aid and assist the said persons exercising the powers of govern-

(p) Davis's Proc. 253; 2 Chit. 68-73; Rev. Stat. §§ 1041 *et seq.*

(q) It must appear on the face of the indictment that the persons adhered to were enemies. Arch. 496.

(r) An allegation that the defendant sent intelligence to the enemy, has been held sufficient, without setting forth the particular letter or its contents. *Resp. v. Carlisle*, 1 Dall. 35.

ment in France, and being enemies to the United States as aforesaid, in a hostile invasion of the dominions of the said United States, and in the prosecution of the said war against the said United States; against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1120) *Aiding and comforting the enemy, with overt acts specially pleaded, consisting of sending provisions in a vessel to one of the enemy's vessels.(s)*

That on, etc., an act of the congress of the United States of America, entitled "An act declaring war between the united kingdom of Great Britain and Ireland and the dependencies thereof and the United States of America and their territories," was approved by the president of the United States of America, and that continually from thence, to wit, from the said, etc., hitherto, by land and sea an open and public war was and yet is prosecuted and carried on between the said United States of America and their territories and the said united kingdom of Great Britain, etc., that is to say, at the county of Philadelphia aforesaid, in the district of Pennsylvania aforesaid, and that the king, etc., and his subjects continually thence, to wit, from the said, etc., hitherto, and yet were and are enemies of the said United States of America, that is to say, at, etc., and that W. P., late of, etc., mariner, a citizen of the said United States of America, owing allegiance and fidelity to the said United States of America, well knowing the premises, but not regarding the duty of his allegiance, not having the fear of God in his heart, but being moved and seduced by the instigations of the devil, as a false traitor against the said United States of America, and wholly withdrawing the allegiance and fidelity which every true and faithful citizen of the United States of America should and ought of right to bear towards the said United States of America, and wickedly continuing, and with all his strength intending, to aid and assist the said king, etc., and his subjects, then

(s) U. S. v. Pryor, 3 Wash. C. C. R. 234. The indictment contained five counts, the first four of which were abandoned by the district attorney for want of evidence, and on the last the defendant was acquitted. The bill was drawn by Mr. A. J. Dallas, then district attorney. Wh. Cr. L. 8th ed. §§ 1802, 1803.

being enemies of the said United States of America, in the prosecution of the said war against the said United States of America, heretofore and during the said war, to wit, on, etc., and on divers other days, as well before as after the said last mentioned day, with force and arms, at, etc., maliciously and traitorously, did adhere to the said king, etc., and his subjects, etc., then being, etc., giving them aid and comfort; and that in the * prosecution, performance, and execution of his treason and traitorous adhering aforesaid, he the said W. P., as such false traitor as aforesaid, during the said war, to wit, on, etc., and on divers other days, as well before as after the last mentioned day, * at, etc., with force and arms, maliciously and traitorously, did conspire, consult, consent, and agree with divers other false traitors, whose names are to the said grand inquest unknown, to aid and assist the said king, etc., in a hostile blockade of the said United States of America, and in the prosecution of the said war against the said United States of America. And in further (*here insert paragraph marked above between * and *, and continue*): at, etc., with force and arms, maliciously and traitorously, did procure and prepare, and cause to be procured and prepared, a certain schooner called the P., and certain mariners whose names are to the said grand inquest unknown, for the unlawful and traitorous purpose of conveying and transporting in and on board of the said schooner called the P., by the said W. P. traitorously procured and prepared, and caused to be procured and prepared as aforesaid, certain provisions and necessaries, that is to say (*here specify articles*), from, etc., unto certain ships and vessels of war, belonging to the said king of, etc., and officered and manned by his subjects, † the said king, etc., and his said subjects, the said officers and men of the said ships and vessels of war, then and yet being enemies of the said United States of America, and the ships, etc., then being in and near the bay and river D., hostilely employed in blockading the ports and harbors of the said river D. in the said United States of America, † to the intent unlawfully and traitorously to deliver, and cause to be delivered, the said provisions and necessaries, to wit (*here specify the articles*), ‡ at, to, and on board of the said ships, etc., or some one of them, for the aid and comfort, supply, sustenance, and use of the officers and crews of the said ships,

etc., being subjects of the said king, etc., as aforesaid, and being then and yet, together with their said king, enemies of the said United States of America, in the prosecution of the said war against the said United States of America. ‡

And in further (*here insert part between * *, and continue*): at, etc., with force and arms, did take and receive, and cause to be taken and received, in and on board of the said schooner called the P., whereof the said W. P. was then and there owner and master, certain provisions, for the unlawful and traitorous purpose of conveying and transporting the said provisions, etc., in and on board of the said schooner called the P., from, etc., into certain ships, etc., belonging to the said king, etc., and officered and manned by his subjects (*here insert part between † † and continue*): to the intent unlawfully and traitorously to deliver, and cause to be delivered, the said provisions, etc., to wit (*specifying them*), by the said W. P. traitorously taken and received, and caused to be taken and received, in and on board of the said schooner called the P. as aforesaid (*here insert part between † †*).

And in further (*here insert part between * *, and continue*): at, etc., with force and arms, maliciously and traitorously, into a certain schooner called the P., by the said W. P. then and there maliciously and traitorously procured and prepared, and caused to be procured and prepared as aforesaid, for his traitorous purposes aforesaid, then and there having on board of the said schooner called the P. certain provisions, etc. to wit (*specifying them*), by the said W. P. then and there maliciously and traitorously taken and received on board thereof as aforesaid, for his traitorous purposes aforesaid, then and there did enter and in and with the said schooner P. did maliciously and traitorously sail and depart from etc., towards certain ships, etc., belonging to the said king, etc., and manned by his subjects (*here insert part between † †*), to the intent the said provisions, etc., to wit (*specifying them*), by the said, etc., traitorously taken and received, and caused to be taken and received, on board the said schooner called the P. as aforesaid, unlawfully and traitorously to deliver, and cause to be delivered (*here insert part between † †*).

And in further (*here insert part between * **), at, etc., with force and arms, maliciously and traitorously, did convey and transport,

and cause to be conveyed and transported, and the said schooner called the P., whereof the said W. P. was then and there owner and master, certain provisions, etc., toward and to certain ships, etc., belonging to the said king, etc., and officered and manned by his subjects (*here insert part between † † and continue*): to the intent unlawfully and traitorously the said provisions and necessities to deliver, and cause to be delivered (*here insert part between † †*).

And the said provisions and necessities, by the said W. P. so traitorously conveyed and transported, and caused to be conveyed and transported, in the said schooner called the P., from, etc., toward and to the said ships of war, for the traitorous purposes aforesaid, the said W. P. maliciously and traitorously delivered, and caused to be delivered (*here insert part between † †*), to wit, at, etc.

And in further (*here insert part between * **), at, etc., with force and arms, maliciously and traitorously, did then and there procure and prepare, and caused to be procured and prepared, a certain schooner called the P., with certain mariners whose names are to the said grand inquest unknown, and maliciously and traitorously did then and there take and receive, and cause to be taken and received, in and on board of the said schooner called the P., certain provisions, etc., to wit (*specifying them*), and did then and there maliciously and traitorously enter into the said schooner called the P., and did then and there maliciously and traitorously sail and depart in the said schooner called the P. with the said provisions, etc., on board thereof as aforesaid, from, etc., down the river and bay of D. toward the high seas. to the intent the said provisions and necessities by the said W. P. traitorously taken and received, and caused to be taken and received, in and on board of the said schooner called the P. as aforesaid, maliciously and traitorously to deliver, and cause to be delivered, on the high seas aforesaid, to the said enemies of the said United States of America, in and on board of a certain vessel of war (whose name is to the said grand inquest unknown), belonging to the said king, etc., then and yet an enemy of the said United States of America, for the aid, comfort, supply, sustenance, and use of the said enemies of the said United States of America in carry-

ing on and prosecuting the said war against the said United States of America.

And in further (*here insert part between * *, and continue*): on the high seas, out of the jurisdiction of this court, to wit, at, etc., with force and arms, maliciously and traitorously, did then and there deliver, and cause to be delivered, from and out of a certain schooner called the P. then and there being, whereof the said W. P. was then and there master, unto the said enemies of the said United States of America then and there being, and on board of a certain vessel of war whose name is to the said grand inquest unknown, belonging to the said king, etc., then and yet being an enemy of the said United States of America, certain provisions, etc., for the aid, comfort, supply, sustenance, and use of the said enemies of the said United States of America, in the prosecution of the said war against the said United States of America.

§ And in further (*here insert part between * *, and proceed*): being in and on board of a certain ship of war whose name is to the said grand inquest unknown, belonging to the said king, etc., then and yet an enemy of the said United States of America, the said ship of war lying and being in the bay of D., to wit, at, etc., did then and there, maliciously and traitorously, § undertake to procure, and caused to be procured, from the shore and territory of the said United States of America || certain provisions, necessities, and articles of food, to wit, to the intent the said provisions, necessities, and articles of food, the said bullocks and live stock by the said W. P. traitorously procured, and caused to be procured as aforesaid, maliciously and traitorously to deliver, and cause to be delivered, to and on board of the said last mentioned ship of war, for the aid, comfort, supply, sustenance, and use of the officers and crews thereof, being enemies of the said United States of America, in the prosecution of the said war against the said United States of America. ||

(*Here insert part between § § and proceed*): depart from said ship of war last mentioned in a boat, and did maliciously and traitorously proceed in the said boat towards and to the territory of the said United States of America, for the traitorous purpose of procuring, and causing to be procured (*here insert part between " and conclude*): in contempt of the said United States

of America, their constitution and laws, to the evil example of all others in like case offending, contrary to the duty of allegiance of him the said W. P., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1121) *Illegal outfit of vessel, etc., against a foreign nation, etc.(t)*

That J. M., late of, etc., in the district aforesaid, mariner, on, etc., within the port of Philadelphia, being a port of the United States, to wit, in the said district of Pennsylvania, did unlawfully * fit out and arm a certain brig or vessel called "The Friends," then lying and being within the port aforesaid, with intent that the said brig or vessel should be employed in the service of the king of the united kingdom of Great Britain and Ireland, being a foreign prince with whom the said United States are and then were at peace, to cruise and commit hostilities upon the citizens and property of the Batavian Republic, and upon the citizens and property of the French Republic, being foreign states with whom the United States are and then were at peace, and upon the citizens and property of other states, being foreign states with whom the said United States are and then were at peace, to the evil example of others in the like case offending, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first, inserting at * the words*): "attempt to."

(*Add third and fourth counts averring that defendant did "unlawfully procure to be fitted out and armed," etc., and that he "was unlawfully concerned in furnishing, fitting out, and arming," the rest being as in first count.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(t) *U. S. v. Metcalfe*. This indictment was drawn by Mr. A. J. Dallas, in 1894. The defendant pleaded *nolo contendere*. See Wh. Cr. L. 8th ed. §§ 1901 *et seq.*; Rev. Stat. § 5284.

(1122) *Beginning, setting on foot, providing and preparing the means of a military enterprise or expedition against the territory or dominions of a foreign prince.*(*v*)

That W. S. S., late of, etc., did, on, etc., within the (territory(*v*) and) jurisdiction of the said United States, to wit, at, etc., begin a certain military expedition to be carried on from thence against the dominions of a foreign prince, to wit, the dominions of the king of Spain, the said United States then and there being at peace with the said king of Spain, against, etc., to the evil example of all others in like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That the said W. S. S., afterwards, to wit, on, etc., within the (territory and) jurisdiction of the said United States, to wit, at, etc., with force and arms, did set on foot a certain military enterprise, to be carried on from thence against the territory of a foreign prince, to wit, the territory of the king of Spain, the said king of Spain then and there being at peace with the said United States, against, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Same as second count down to "force and arms," and then proceed as follows*): Set on foot a certain other military enterprise, to be carried on from thence against the territory of a foreign prince, to wit, against the province of Caraccas, in South America, the said province of Caraccas then and there being the

(*u*) This indictment was used in the trial of Smith, for engaging in Miranda's expedition; and, with a verbal alteration in the fourth and fifth count, is the same as that used on the trial of Ogden for the same offence, and on the trial of La Croix, for setting on foot an expedition against Mexico, in 1814. It is founded on the fifth section of the act of June 5th, 1794, which declares, "that if any person shall, within the territory or jurisdiction of the United States, begin, or set on foot, or provide, or prepare the means of any military expedition or enterprise, to be carried on from thence against the territory or dominions of any foreign prince or state, with whom the United States are at peace, every such person so offending, shall, upon conviction, be adjudged guilty of a misdemeanor." The phraseology is slightly changed in Rev. Stat. § 5285. See this case noticed in Wh. Cr. L. 8th ed. § 1908, *note*.

(*v*) The words in brackets were inserted by Mr. Dallas in the indictment against La Croix.

territory of the king of Spain, and the said king of Spain then and there being at peace with the said United States, against, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

(*Same as second count down to "force and arms," and then proceed as follows*): Provide the means, to wit (thirty men and three hundred dollars in money), for a certain other military enterprise, to be carried on from thence against the dominions of a foreign prince, to wit, against the dominions of the king of Spain in South America, the said king of Spain then and there being at peace with the said United States, against, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

(*Same as second count down to "force and arms," and then proceed as follows*): Prepare the means, to wit (thirty men and three hundred dollars in money), for a certain other military expedition, to be carried on from thence against the province of Caraccas, in South America, the said province of Caraccas then and there being the territory of a foreign prince, to wit, the territory of the king of Spain, and the said king of Spain then and there being at peace with the said United States, against, etc., to the evil example, etc., against, etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

(*Same as second count down to "force and arms," and then proceed as follows*): Provide the means, to wit (thirty men, whose names are to the jurors aforesaid yet unknown, and three hundred dollars in money), for a certain other military expedition, to be carried on from thence against the dominions of some foreign state, to the jurors aforesaid unknown, yet with whom the said United States were then and there at peace, against, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3*)

Seventh count.

(*Same as second count down to "force and arms," and then proceed as follows*): Set on foot a certain other military enter-

prise, to be carried on from thence against the dominions of some foreign state, to the jurors aforesaid yet unknown, with whom the United States were then and there at peace, against, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count see 17, 18, 181, n., 239, n.*)

(1123) *Enlisting soldiers in the United States in the service of a foreign prince.*

That H. H., late of the district aforesaid, yeoman, and E. C. P., late of the district aforesaid, yeoman, heretofore, to wit, on, etc., in the district aforesaid, and within the jurisdiction of this court, with force and arms, did hire and retain one W. B. to enlist himself as a soldier in the service of a foreign prince, state, colony, district, and people, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

That H. H., late of the district aforesaid, yeoman, and E. C. P., late of the district aforesaid, yeoman, heretofore, to wit, on, etc., at the district aforesaid, and within the territory and jurisdiction of the United States, and of this honorable court, with force and arms, * did hire and retain W. B. to enlist and enter himself as a soldier in the service of a foreign prince, state, colony, district, and people, to wit, the service of her most gracious majesty the queen of Great Britain and Ireland, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Same as second to *, and proceed*): “did hire and retain W. B. to go beyond the limits and jurisdiction of the United States, with the intent of him, the said W. B., to be enlisted and entered as a soldier in the service of a foreign prince, state, colony, district, and people, contrary to the form, etc., and against the peace,” etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

(*Same as second to *, and proceed*): “did hire and retain W. B. to go beyond the limits and jurisdiction of the United States,

with the intent of him, the said W. B., to be enlisted and entered as a soldier in the service of a foreign prince, state, colony, district, and people, to wit, the service of her most gracious majesty the queen of Great Britain and Ireland, contrary, etc., and against," etc. (*Conclude as in book 1, chapter 3.*)

Fifth count.

(*Same as second to *, and proceed*): "did hire and retain W. B. to go beyond the limits and jurisdiction of the United States, with the intent of him, the said W. B., to be enlisted and entered as a soldier in the service of a foreign prince, state, colony, district, and people; the said H. H. and E. C. P., at the time they so hired and retained the said W. B. to go beyond the limits and jurisdiction of the United States, with the intent as aforesaid, not being subjects and citizens of any foreign prince, state, colony, district, and people, transiently within the United States, and the said hiring and retaining not being on board any vessel of war, letter of marque, or privateer, which at the time of the arrival within the United States of such vessel of war, letter of marque, or privateer, was fitted and equipped as such, and the said W. B. so hired and retained, not being a subject or citizen of the same foreign prince, state, colony, district, and people, transiently within the United States, enlisting and entering himself to serve such foreign prince, state, colony, district, and people, on board such vessel of war, letter of marque, or privateer, the United States being at peace with such foreign prince, state, colony, district, and people, etc., contrary, etc., and against," etc. (*Conclude as in book 1, chapter 3.*)

Sixth count.

(*Same as second count to *, and proceed*): "did hire and retain W. B. to go beyond the limits and jurisdiction of the United States, with intent of him, the said W. B., to be enlisted and entered as a soldier in the service of a foreign prince, state, colony, district, and people, to wit, in the service of her most gracious majesty the queen of Great Britain and Ireland; the said H. H. and E. C. P., at the time they so hired and retained the said W. B. to go beyond the limits and jurisdiction of the United States, with the intent as aforesaid, not being subjects

and citizens of the said queen of Great Britain, transiently within the United States, the said hiring and retaining not being on board any vessel of war, letter of marque, or privateer, which at the time of its arrival within the United States was fitted and equipped as such, and the said W. B. so hired and retained not being a subject or citizen of her most gracious majesty the queen of Great Britain and Ireland, transiently within the United States, enlisting and entering himself to serve the said queen of Great Britain, on board such vessel of war, letter of marque, or privateer, the United States being at peace with the said her most gracious majesty the queen of Great Britain and Ireland, contrary, etc., and against," etc.(w) (*Conclude as in book 1, chapter 3.*)

(*For final counts, see 17, 18, 181, n., 239, n.*)

(w) This is the form used in *U. S. v. Hertz et al.*, U. S. circuit court, Phila. 1855. Wh. Cr. L. 8th ed. § 1904. The defendants were convicted, and a motion for a new trial was overruled. In the course of his charge to the jury, Judge Kane said :—

"The act of congress is in these words—I read the words material to the question, leaving out those which apply to a different state of circumstances :

" ' If any person shall, within the territory of the United States, hire or retain any person to go beyond the limits of the United States, with the intent to be enlisted in the service of a foreign prince, he shall be deemed guilty of a high misdemeanor.'

"The question which you have to pass upon is, Did Henry Hertz hire or retain any of the persons named in these bills of indictment to go beyond the limits of the United States, with the intent to be enlisted or entered in the service of a foreign state?

"Did he hire or retain a person? Whatever he did was within the territory of the United States.

"The hiring or retaining does not necessarily include the payment of money on the part of him who hires or retains another. He may hire or retain a person, with an agreement that he shall pay wages when the services shall have been performed. The hiring or retaining a servant is not generally by the payment of money, in the first instance, but by the promise to pay money when the services shall have been performed; and so a person may be *hired* or *retained* to go beyond the limits of the United States, with a certain intent, though he is only to receive his pay after he has gone beyond the limits of the United States with that intent.

"Moreover, it is not necessary that the consideration of the hiring shall be money. To give to a person a railroad ticket, that cost \$4, and board and lodge him for a week, is as good a consideration for the contract of hiring as to pay him the money with which he could buy the railroad ticket and pay for his board himself. If there be an engagement on the one side to do the particular thing, to go beyond the limits of the United States with the intent to enlist, and on the other side an engagement, that when the act shall have been done, a consideration shall be paid to the party performing the services, or doing the work, the hiring and retaining are complete.

"The meaning of the law then is this: that if any person shall engage, hire, retain, or employ another person to go outside of the United States to do that

(1124) *Conspiracy to impede the operation of certain acts of congress. First count, conspiracy alone.*(x)

That H. S., etc., on, etc., at, etc., within the jurisdiction of this court, with divers other persons to the said grand inquest unknown, did unlawfully combine and conspire together with intent to impede the operation of a law of the United States, entitled "An act to provide for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States," and also a law of the said United States, entitled "An act to lay and collect a direct tax within the United States," and to intimidate and prevent the assessors and other persons appointed to carry the same acts into execution from undertaking, performing, and fulfilling their trusts and duties, * to the evil example, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1125) *Second count. Overt act; rioting, etc.*

(*Same with first down to *, and proceed*): and that the said H. S. (and the others), with the unlawful intent aforesaid, afterwards, to wit, the same day and year, at the district aforesaid, and within the jurisdiction of this court, did counsel, advise, and attempt to procure an insurrection, riot, and unlawful assembly, to the evil example, etc., against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1126) *Third count. Rescue of persons under custody of marshal.*

That whereas R. P., judge of the district court of the United States in and for the district of Pennsylvania, on, etc., at P., in the district aforesaid, did make, direct, and deliver his warrants

which he could not do if he remained in the United States, viz.: to take part in a foreign quarrel; if he hires another to go, knowing that it is his intent to enlist when he arrives out; if he engages him to go because he has such an intent, then the offence is complete within the section. Every resident of the United States has the right to go to Halifax, and there to enlist in any army that he pleases; but it is not lawful for a person to engage another here to go to Halifax for that purpose. It is the hiring of the person to go beyond the United States, that person having the intention to enlist when he arrives out, and that intention known to the party hiring him, and that intention being a portion of the consideration because of which he hires him, that defines the offence."

(x) U. S. Cir. Ct. for Pa. 1799. This form was used against the Northampton insurgents.

or precepts in writing to W. N., Esq., he the said W. N. then and there being marshal of the said district of Pennsylvania, by which said warrants he the said W. N., the marshal aforesaid, was commanded to take the bodies of D. H. (*and five others, naming them*), with sundry other persons, late of the county of Northampton, yeomen, and bring them before him the said R. P. to find sufficient sureties for their appearance at the next stated session of the circuit court of the United States for the middle circuit and district of Pennsylvania, to be holden at Philadelphia, on, etc., to answer to a charge of being concerned in an unlawful conspiracy and combination to impede the operation of a law of the United States, entitled "An act to lay and collect a direct tax within the United States," and to such other matters as should in behalf of the United States be then and there objected against them, and further to be dealt with according to law, † which said W. N., the marshal aforesaid, afterwards, that is to say, on, etc., at the district aforesaid, by virtue of the said warrants, did take and arrest them the said D. H. (*and the others, naming them*), for the cause aforesaid, and them the said D. H. (*and the others, naming them*), in his custody by virtue of the said warrant then and there had; and the said H. S. (*and the other defendants, naming them*), well knowing the said D. H. (*and the others, naming them*) to be arrested as aforesaid, afterwards, to wit, on, etc., at, etc., with force and arms, against the will of the said W. N., unlawfully did rescue and set at large the said D. H. (*and the others, naming them*), to go where they would, in contempt of the said United States and the laws thereof, to the great damage of the said W. N., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Fourth count.

(*Same as third down to † and then proceed*): and the said H. S., etc., well knowing the premises, afterwards, to wit, on, etc., at, etc., knowingly and wilfully did obstruct, resist, and oppose the said W. N., then and there being marshal as aforesaid, in executing the said warrants, so that the said W. N., the said marshal, by reason of such unlawful obstruction, resistance, and opposition was hindered and prevented from executing the said warrants, and could not bring the said D. H., etc., before the said R.

P., the said judge of the district aforesaid, as by the said warrants he was commanded, against the form of the act of congress aforesaid in such case made and provided, in contempt, etc., to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1127) *Conspiracy to raise an insurrection against the United States. First count, by advising the people to resist the execution of the excise law.*(y)

That W. B., late of, etc., yeoman, being an evil disposed, pernicious, and seditious person, and of a wicked and turbulent disposition, falsely, maliciously, and unlawfully intending and contriving the peace and tranquillity of the United States of America to disquiet, molest, and disturb, and as much as in him lay, seditious insurrection and rebellion against the United States to incite, move and procure, and to bring the constitution and laws thereof into danger and contempt, and in pursuance of such his false, wicked, and unlawful designs, he the said W. B., on, etc., at, etc., and with force and arms, unlawfully, maliciously, and seditiously did assemble, unite, conspire, consult, and confederate with D. M. (*and others, naming them*), and divers other false and ill-disposed persons to the grand inquest as aforesaid yet unknown, and with the same other persons he the said W. B. then and there treated at and about carrying into effect his said wicked and seditious compassings, imaginations, and intentions, and then and there, with force and arms, unlawfully, wickedly, and seditiously did consult, combine, and confederate with the persons aforesaid, to raise an insurrection within the said United States, and to levy war against the same, to wit, in the district aforesaid, and to meet and assemble themselves together, in, etc., armed in a warlike manner, against the said United States, and to array and dispose themselves in a traitorous and hostile manner against the said United States, and in opposition to the laws thereof, to wit, in the county aforesaid, in the district aforesaid; and he the said W. B. did then and there, in pursu-

(y) *U. S. v. Bonham*, 1794. This was one of the indictments against the whiskey insurgents. The case was never tried.

ance of his said malicious and seditious views and intentions, openly and publicly advise and recommend to the citizens of the said United States then and there met and assembled, to resist and oppose the execution and operation of the laws of the said United States for collecting a revenue; against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1128) *Second count. Setting up a liberty pole for the purpose of inciting the people to sedition.*(z)

That the said W. B., being a pernicious, seditious, and ill-disposed person, and falsely, maliciously, and unlawfully contriving and intending the peace and tranquillity of the said United States to disquiet, molest, and disturb, and as much as in him lay, seditious insurrection and rebellion against the said states to incite, stir up, and promote, and to bring the constitution and laws thereof into danger and contempt, on, etc., at, etc., in the public highway, with a great number of evil disposed persons, whose names to the grand inquest aforesaid are yet unknown, unlawfully, maliciously, and seditiously did erect and set up a certain pole, denominating the same a liberty pole, and did then and there maliciously and advisedly affix thereon certain inflammatory and seditious words and sentences, wickedly, and maliciously intending thereby, and with all his might endeavoring to encourage and incite the citizens of the said United States within the district aforesaid, and to oppose and resist the laws and authority of the said United States, and insurrection and war against the same United States to raise and levy, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(*For final count, see 17, 18, 181, n., 239, n.*)

(1129) *Conspiracy to assemble a seditious meeting. First count.*(a)

That H. V., W. E., J. D., and W. A. T., being seditious and evil disposed persons, intending to disturb the public peace, and to excite discontent and disaffection, and to excite her majesty's

(z) Judge Addison thought that to set up a liberty pole was a mark of sedition and of disrespect to the government, which might be punished by the state courts as a misdemeanor at common law (*Penna. v. Morrison*, Add. R. 274). But this cannot now be sustained. See Wh. Cr. L. 8th ed. §§ 17, 1550.

(a) *R. v. Vincent*, 9 C. & P. 91. The jury found the defendants not guilty of conspiracy, but guilty of attending seditious meetings.

subjects to hatred and contempt of the government and constitution of this realm, heretofore, to wit, on, etc., at, etc., did conspire, etc., together with divers other persons unknown, unlawfully, maliciously, and seditiously to meet and assemble themselves together, and to cause and procure a great number of other persons unlawfully, maliciously, and seditiously to meet and assemble themselves together, with the said H. V., W. E., J. D., and W. A. T., and the other conspirators, at, etc., for the purpose of exciting discontent and disaffection in the minds of the liege subjects of our said lady the queen, and for the purpose of moving and exciting the liege subjects of our said lady the queen to hatred and contempt of the government and constitution of this realm, as by law established.(b)

(1130) *Conspiracy to raise an insurrection and obstruct the laws.*

First count.(c)

That R. S., on, etc., and on divers other days and times, at, etc., did conspire, confederate, combine, and agree together with W. J., and divers other evil disposed persons to the jurors afore-

(b) The second count was similar, but stated as an overt act of the conspiracy, that the conspirators assembled at, etc., on, etc., to the number of two thousand and more, in a menacing manner, with offensive weapons, and did cause great terror and alarm to the peaceful and well disposed subjects of her majesty.

The third count was in the following form: That the said H. V., W. E., J. D., and W. A. T., being such persons as aforesaid, and unlawfully and maliciously and seditiously intending and devising as aforesaid, heretofore, to wit, on, etc., with force and arms, at, etc., unlawfully, maliciously, and seditiously, and in a tumultuous manner did meet and assemble themselves together with divers other ill-disposed persons, whose names are to the jurors aforesaid unknown, to a large number, to wit, to the number of two thousand, in a formidable and menacing manner, in a certain public and open place near the dwelling-houses of divers liege subjects of our said lady the queen, inhabiting therein, for the purpose of raising and exciting discontent and disaffection in the minds of the liege subjects of our said lady the queen, and of exciting the said subjects to hatred and contempt of the government and constitution of this realm as by law established, and of moving the said subjects to unlawful and seditious opposition and resistance to the said government and constitution; and being so met and assembled together for the purpose aforesaid, did then and there unlawfully and tumultuously continue together with the said other ill-disposed persons in such formidable and menacing manner, for a long space of time, to wit, for the space of four hours, and did then and there, during all such time, by loud and seditious speeches, exclamations, and cries, raise and excite such discontent and disaffection as aforesaid, and did thereby, then and there, cause great terror and alarm to divers peaceable and well disposed subjects of our said lady the queen, in contempt, etc., and against, etc. See Wh. Cr. L. 8th ed. §§ 1353-6, 1535.

(c) R. v. Shellard, 9 C. & P. 277.

said unknown, to raise and make insurrections, riots, routs, and seditious and unlawful assemblies within this realm, and to obstruct the laws and government of this realm, and to oppose and prevent their due execution, and to procure and obtain arms for the more effectual carrying into effect their said conspiracy, confederacy, etc.; and in furtherance of the said conspiracy, confederacy, etc., the said W. J., during the time aforesaid, to wit, on, etc., with force and arms, to wit, at, etc., together with the said W. J., and divers other persons to the said jurors unknown, to the number of two thousand and more, unlawfully, seditiously, riotously, and routously did assemble and meet together, armed with guns, etc., and remained and continued so unlawfully and seditiously assembled and met together, armed as aforesaid, for a long space of time, to wit, for the space of forty-eight hours then next following: and during that time made a great riot, rout, and unlawful assembly, and during the time last aforesaid attacked and broke open divers dwelling-houses of divers liege subjects of our said lady the queen, in the county aforesaid, and beat, bruised, wounded, and ill-treated divers of the liege subjects of our said lady the queen, then and there being in the county aforesaid, and seized and took from the said last mentioned subjects, and other subjects of our said lady the queen, then and there being in the county aforesaid, divers quantities of arms, to wit, one hundred guns, etc., and therewith then and there unlawfully and seditiously armed themselves, against, etc. (*Conclude as in book 1, chapter 3.*)

(1131) *Levyng war against the state of Massachusetts.*(d)

That A. B., of, etc., yeoman, on, etc., at, etc., in the county aforesaid, he the said A. B. being a person then and there abiding within the state and commonwealth aforesaid, and deriving protection from the laws of the same, and then and there owing allegiance and fidelity to the said state and commonwealth, and being then and there a member thereof, not regarding the duty of his said allegiance and fidelity, but wickedly devising and in-

(d) Davis's Prec. 252. "This indictment is drawn under the statute of 1777. See appendix to Massachusetts Laws, vol. 2, p. 1046; see 2 Chit. 83, 84, for an indictment against Lord George Gordon, for exciting riots in 1780; Cro. C. C. 189; 1 Trem. P. C. 1."

tending the peace and tranquillity of the said state and commonwealth to disturb and destroy, on, etc., at, etc., did then and there unlawfully, maliciously, and traitorously conspire to levy war against the said state and commonwealth; and to fulfil and bring to effect the said traitorous compassings, intentions, and conspirings of him the said A. B., he the said A. B. afterwards, that is to say, on, etc., at, etc., with a great multitude of other persons, whose names are to the jurors aforesaid as yet unknown, to the number of one hundred and upwards, armed and arrayed in a warlike manner, that is to say, with guns, swords, and other warlike weapons, as well offensive as defensive, being then and there unlawfully, maliciously, and traitorously assembled and gathered together, did falsely, maliciously, and traitorously assemble, combine, conspire, and join themselves together against the said state and commonwealth, and then and there, with force and arms, did wickedly, falsely, maliciously, and traitorously, and in a warlike and hostile manner, array and dispose themselves against the said state and commonwealth, and then and there, in pursuance of such their malicious and traitorous intentions, conspirings, and purposes, he the said A. B. and the said other persons to the jurors aforesaid unknown, so as aforesaid traitorously assembled, armed, and arrayed in manner aforesaid, most wickedly, maliciously, and traitorously did ordain, prepare, and levy war against the said state and commonwealth, contrary to the duty of the allegiance of the said A. B., against, etc., and contrary, etc. (*Conclude as in book 1, chapter 3.*)

(1132) *Conspiring to incite an insurrection against, and to subvert the government of the state of Rhode Island, with overt act, consisting of attempt to usurp the place of member of the legislature, etc.(c)*

That A. B., of, etc., gentleman, being an inhabitant of and residing within the state of Rhode Island and Providence Plantations, and under the protection of the laws of said state of Rhode Island and Providence Plantations, and owing allegiance and fidelity to the said state, not weighing the duty of his said allegiance, but wickedly and traitorously devising and intending

(c) This is the indictment used in the trials arising from the Dorr insurrection. See Wh. Cr. L. §§ 1812 *et seq.*

the peace of the said state to disturb, and to stir up, move, and excite insurrection, rebellion, and war against the said state, and to subvert and alter the legislative rule and government of the said state, and to usurp the sovereign power thereof, and to set up and establish a certain usurped and pretended government in the place of the true and rightful government of the said state, on, etc., at, etc., maliciously and traitorously, with force and arms, did, with divers other false traitors, whose names are unknown to the said jurors, conspire, compass, imagine, and intend to stir up, move, and excite insurrection, rebellion, and war against the said state, and to subvert and alter the legislative rule and government of the said state, and to usurp the sovereign power of the said state, and to set up and establish a certain usurped and pretended government in the place and stead of the true, lawful, and rightful government of the said state; and to fulfil, perfect, and bring to effect his most evil and wicked treason, and treasonable compassings and imaginations aforesaid, he the said A. B., did, on, etc., with force and arms, at, etc., within the territorial limits of the said state of Rhode Island and Providence Plantations, as the same are now actually held and enjoyed, not being duly elected thereto according to the laws of said state, and under a pretended constitution of government for said state, maliciously and traitorously assume to exercise the legislative functions of member of the house of representatives from the said city of Providence, in a pretended general assembly of said state, then and there held, contrary to the duty of his said allegiance and fidelity, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Second count.

(*Same as first, omitting "force and arms," down to "constitution of government for said state," and then insert*): And being, with divers other false traitors to the jurors aforesaid unknown, then and there assembled and met together, as a pretended general assembly of said state, did maliciously and traitorously assume to exercise the legislative functions of a member of the house of representatives from the said city of Providence, in the said pretended general assembly of said state, then and there

held, contrary to the duty of his said allegiance and fidelity, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

Third count.

(*Same as first down to "constitution of government for said state," and then insert*): And being, with divers other false traitors to the jurors aforesaid as yet unknown, then and there assembled and met together, as a general assembly for said state, did then and there, maliciously and traitorously, assume to exercise the legislative functions of a member of the house of representatives from the said city of Providence, in the said pretended general assembly of said state, and as such member did then and there vote for the passage of divers pretended acts and laws for the said state, contrary to the duty of his said allegiance and fidelity, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1133) *Treason against a state before the federal constitution. Overt act, taking a commission from the British government in 1778.(f)*

That A. C., late of, etc., carpenter, being an inhabitant of and belonging to and residing within the state of P., and under the protection of its laws, and owing allegiance to the same state, as a false traitor against the same, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, the fidelity which to the same state he owed wholly withdrawing, and with all his might intending the peace and tranquillity of this commonwealth of P. to disturb, and war and rebellion against the same to raise and move, and the government and independency thereof as by law established to subvert, and to raise again and restore the government and tyranny of the king of Great Britain within the said commonwealth, on, etc., and at divers days and times, as well before as after, at, etc., with force and arms, did falsely and traitorously take a commission or commissions from the king, etc., and then and

(f) *R. v. Roberts*, 1 Dall. 35. Wh. Cr. L. 8th ed. § 1809. The defendant was sentenced under this indictment after a struggle of great animation. The form of the indictment, it was said by the attorney-general in argument, was similar to that against Eneas M'Donald, Fost. 5. See Wh. Cr. L. §§ 1812 *et seq.*

there, with force and arms, did falsely and treacherously also take a commission or commissions from General Sir W. H., then and there acting under the said king, and under the authority of the said king of Great Britain, to wit, a commission to watch over and guard the gates of the city of P., by the said Sir W. H. erected and set up for the purpose of keeping and maintaining the possession of the said city, and of shutting and excluding the faithful and liege inhabitants and subjects of this state of the United States from the said city; and then and there, also maliciously and traitorously, with a great multitude of traitors and rebels against the said commonwealth (whose names are as yet unknown to the jurors), being armed and arrayed in a hostile manner, with force and arms, did falsely and traitorously assemble and join himself against this commonwealth, and then and there, with force and arms, did falsely and traitorously, and in a warlike and hostile manner, array and dispose himself against this commonwealth, and then and there, in pursuance and execution of such his wicked and traitorous intentions and purposes aforesaid, did falsely and traitorously prepare, order, wage, and levy a public and cruel war against this commonwealth, then and there committing and perpetrating a miserable and cruel slaughter of and amongst the faithful and liege inhabitants thereof, and then and there did, with force and arms, falsely and traitorously aid and assist the king of Great Britain, being an enemy at open war against this state, by joining his armies, to wit, his army under the command of General Sir W. H., then actually invading this state, and then and there maliciously and traitorously (with divers other traitors to the jurors aforesaid unknown), with force and arms, did combine, plot, and conspire to betray this state and the United States of America into the hands and power of the king of Great Britain, being a foreign enemy to this state and to the United States of America, at open war against the same, and then and there did, with force and arms, maliciously and traitorously give and send intelligence to the said enemies for that purpose, against the duty of his allegiance, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1134) *Misdemeanor in going into the city of Philadelphia while in possession of the British army.*(g)

That C. M. and J. M., all late of, etc., yeomen, on, etc., at, etc., and within the jurisdiction of this court, did, and each of them did, go and pass through the county of Philadelphia, into the city of Philadelphia, while in possession of the British army, without obtaining leave in writing for that purpose from congress, from the commander-in-chief of the armies of the United States of America, or of the executive council of this commonwealth, contrary, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1135) *Enticing United States soldiers to desert.*

That A. B., late of, etc., in the district and circuit aforesaid, heretofore, to wit, on, etc., in, etc., with force and arms, at, etc., in the district and circuit aforesaid, and within the jurisdiction of this court, unlawfully, knowingly, and advisedly did procure and entice C. D., etc. (he the said C. D., etc., then and there being a soldier in the service of the United States of America aforesaid), to desert from his service, duty, and allegiance to the said United States, he the said A. B., at the time he so procured and enticed the said C. D., etc., to desert as aforesaid, well knowing that the said C. D., etc., was then and there a soldier in the service of the said United States, against, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

(1136) *Against a deserter and the person harboring him.*(h)

That on, etc., at, etc., a certain J. M. was a soldier enlisted in the regiment commanded by the Comte du Ponts, in the service of the king of France, the illustrious ally of these United States, and then coöperating with the American troops against the king of Great Britain, at open war against these said States, and so being enlisted, afterwards, to wit, on the same day and year aforesaid, at the county aforesaid, did desert from the regiment aforesaid; and the jurors aforesaid do further present, that

(g) *Res. v. Roberts*, 1 Dall. 35. See Wh. Cr. L. 8th ed. §§ 107, 1809.

(h) This indictment was prepared by Mr. Bradford in Pennsylvania before the adoption of the federal constitution.

J. C., late of, etc., yeoman, not being ignorant of the premises, but well knowing the same as aforesaid, to wit, on the day and year aforesaid, at, etc., unlawfully and for wicked gain sake did harbor, receive, comfort, and conceal him the said J. M., then and there well knowing the said J. M., so as aforesaid to have deserted from the regiment and armies aforesaid, to the evil example of all others in like case offending, and against, etc. (*Conclude as in book 1, chapter 3.*)

(1137) *Supplying unwholesome bread to prisoners of war.*(i)

That A. B., late of, etc., on, etc., at, etc., knowingly, wilfully, deceitfully, and maliciously did provide, furnish, and deliver to and for eight hundred French prisoners of war, whose names to the said jurors are yet unknown, and there being under the protection of the king, confined in a certain hospital called Eastwood Hospital, in the parish and county aforesaid, divers large quantities, to wit, five hundred pounds weight, of bread, to be eaten as food by the said French prisoners of war, such bread being then and there made and baked in an unwholesome and insufficient manner, and then and there being made of and containing dirt, filth, and other pernicious and unwholesome ingredients not fit to be eaten by man, he the said A. B. then and there well knowing the said bread to be baked in an unwholesome and insufficient manner, and to be made of and to contain dirt, filth, and other pernicious and unwholesome materials and ingredients not fit to be eaten as aforesaid, whereby the said prisoners of war did then and there eat of the said bread, and thereby then and there became distempered in their bodies, and injured and endangered in their healths, to the great damage of the said prisoners of war, to the great discredit of our said lord the king, to the evil example, etc., and against, etc. (*Conclude as in book 1, chapter 3.*)

BOOK VI.

CHAPTER I.

PLEAS AND REPLICATION.

- (1138) Not guilty in case of treason or felony.
- (1139) Not guilty in misdemeanors, etc., where the defendant may plead by attorney.
- (1140) Similiter generally.
- (1141) Plea that the defendant has no addition.
- (1142) Plea of misnomer.
- (1143) Replication to the above plea.
- (1144) Plea of a wrong addition.
- (1145) Plea to the jurisdiction.
- (1146) Replication to the above plea.
- (1147) Special pleas generally.
- (1148) Replication.
- (1149) Rejoinder.
- (1150) Plea of *autrefois acquit*.
- (1151) *Autrefois acquit*, another form.
- (1152) Replication to *autrefois acquit*. (To be made *ore tenus*.)
- (1153) Plea that defendant was duly charged, examined, and tried for the murder of the deceased before a court legally constituted, and upon this trial and examination was duly and legally acquitted of the said murder and felony with which he stood charged, and was adjudged by the court not guilty thereof.
- (1154) *Autrefois convict*, plea of, where the original indictment on which the defendant was convicted was one for arson, and the second indictment was for murder in burning a house whereby one J. H. was killed, etc.
- (1155) Demurrer to said plea.
- (1156) Joinder in demurrer.
- (1157) Plea of once in jeopardy.
- (1158) Plea that six of the grand jurors by whom the bill was found were not duly qualified.

(1159) Plea that goods which defendant was charged with rescuing from the sheriff, who had seized them under an execution against a third party, were in fact, at the time, the property of, and in the possession of the defendant.

(1160) Replication.

(1138) *Not guilty in case of treason or felony.*(a)

And being immediately asked how he will acquit himself of the premises (*in case of felony, or of the treasons, in case of trea-*

(a) Stark. C. P. 472. By the common law practice, the clerk, after reading the indictment to the defendant, asks, "How say you, A. B., are you guilty or not guilty?" 2 Hale, 119; R. v. Hensey, 1 Burr. 643; Cro. C. C. 7; *infra*, §§ 545, 698. Upon this, if the defendant confess to the charge, the confession is recorded, and nothing is done till judgment. 4 Harg. St. Trials, 779; Dalt. c. 185; *infra*, §§ 545, 698. But if he deny it, he answers, "Not guilty," upon which the clerk replies that the defendant is guilty, and that the state (or commonwealth) is ready to prove the accusation. 4 Bla. Com. 339; 4 Harg. St. Trials, 779. After issue is thus joined, the clerk usually proceeds to ask the defendant, "How will you be tried?" to which the defendant replies, "By God and my country;" to which the clerk rejoins, "God send you a good deliverance." 2 Hale, 219; 4 Bla. Com. 341; Cro. C. C. 7.

The right of arraignment on a criminal trial may, in some cases, be waived, but a plea is always essential. The court cannot supply an issue after verdict where there has been no plea, notwithstanding that the defendant consented to go to trial. *Hoskins v. State*, 84 Ill. 87; *Gould v. People*, 89 Ill. 216; *Douglas v. State*, 3 Wis. 820; *People v. Gaines*, 52 Cal. 480.

An omission to insert the *similiter*, in joining issue in criminal cases, may be corrected when the record is made up. *Com. v. McCormack*, 126 Mass. 258; *Berrian v. State*, 2 Zab. 9; *State v. Swepson*, 81 N. C. 571. Going to trial without a joinder of issue by the prosecution to a plea in bar waives any objection to such non-joinder. *Com. v. McCauley*, 105 Mass. 69.

The defendant, in felonies, must plead in person. *McQuillan v. State*, 8 Sm. & M. 587. It is otherwise, however, in misdemeanors. *U. S. v. Mayo*, 1 Curtis C. C. 433.

A general plea of not guilty by all the defendants is, in law, a several plea. The pleas are necessarily several.

At common law, when a prisoner stood mute, a jury was called to inquire whether he did so from dumbness *ex visitatione Dei*, or from malice; and unless the former was the case, he was sentenced as on conviction. 1 Ch. C. L. 425; *Turner's case*, 5 Oh. 542; *Com. v. Moore*, 9 Mass. 402. In England, and throughout the United States, however, statutes now exist enabling the court, where the prisoner stands mute, to direct a plea of not guilty to be entered, whereupon the trial proceeds as if he had regularly pleaded not guilty in person. *R. v. Schleter*, 10 Cox C. C. 409; *Dyott v. Com.*, 5 Whart. R. 67; *Brown v. Com.*, 76 Penn. St. 319; where it was held that such course waives jury defects. That such course cures other defects, see *Com. v. McKenna*, 125 Mass. 397. Such a refusal to plead, however, does not admit in any way the jurisdiction of the court. *People v. Gregory*, 30 Mich. 371; see *U. S. v. Borger*, 12 Rep. 134.

The entry must be made before the trial opens. *Davis v. State*, 38 Wis. 387.

The plea of *nolo contendere* has the same effect as a plea of guilty, so far as regards the proceedings on the indictment; and a defendant who is sentenced upon such a plea to pay a fine is convicted of the offence for which he is indicted.

The advantage, however, which may attend this plea is, that, when accom-

son) above laid to his charge, says that he is not guilty thereof, and thereof for good and for ill he puts himself upon the country.(b)

(1139) *Not guilty in misdemeanors, etc., where the defendant may plead by attorney.*

And the said J. S., by A. B. his attorney, comes into court here, and having heard the same indictment (or information) read, says that he is not guilty of the said premises in the said indictment (or information), above specified and charged upon him; and of this the said J. S. puts himself upon the country, etc.

(1140) *Similiter generally.*

And J. K. K., Esq., attorney-general of the said state (or commonwealth), who prosecutes for the said state (or commonwealth) in this behalf, does the like.

PLEA OF MISNOMER.(c)

(1141) *Plea that the defendant has no addition.(d)*

And the said A. B. comes in his proper person, and having heard the said indictment read, says, that he at the time of the

panied by a protestation of the defendant's innocence, it will not conclude him in a civil action from contesting the facts charged in the indictment. U. S. v. Hartwell, 3 Cliff. 221; Com. v. Horton, 9 Pick. 206; Com. v. Tilton, 8 Met. Mass. 232. See Whart. Ev. § 783.

It is within the discretion of the court to accept such a plea, or to require a plea of guilty or not guilty. Com. v. Tower, 8 Met. Mass. 527. In Massachusetts, under St. 1855, c. 215, § 35, a defendant in a prosecution on that statute cannot be adjudged guilty on a plea of *nolo contendere*, unless it appears by the record that the plea was received with the consent of the prosecutor. Com. v. Adams, 6 Gray, 359.

(b) The English practice is, that in cases of treason and felony no issue is joined with the prisoner on behalf of the crown. Stark. C. P. 472.

(c) When the indictment assigns to the defendant a wrong Christian name or surname, he can only take advantage of the error by a plea in abatement. Scott v. Soans, 3 East, 111; Com. v. Dedham, 16 Mass. 146; Turns v. Com., 6 Met. (Mass.) 225; Com. v. Fredericks, 119 Mass. 199; Lynes v. State, 5 Port. 236. Such a plea should be verified by affidavit, and should expose the defendant's proper name. Stark. C. P. 473; O'Connell v. R., 11 Cl. & Fin. 155; Com. v.

(d) Stark. C. P. 474. Mr. Starkie remarks that as the defect is apparent on the record, the objection may be taken on a motion to quash; and this, which is the obvious course, was taken in the Oy. and Ter. of Phil. in 1848, in Com. v. Vickers, by Kelley, J. See also R. v. Thomas, 3 D. & R. 621.

taking of the said indictment, and long before, was and yet is a yeoman; and that the said indictment does not contain an addition of the said estate of the said A. B., nor of any estate, degree, or mystery of the said A. B.; and this he is ready to verify; wherefore, for want of the addition of the estate, degree, or mystery of the said A. B., in the said indictment, he prays judgment of the said indictment, and that the same may be quashed.

(1142) *Plea of misnomer.(e)*

And J. L., who is indicted by the name of G. L., in his own proper person cometh into court here, and having heard the said indictment read, says, that he was baptized by the name of

Sayres, 8 Leigh, 722; *R. v. Granger*, 3 Burr. 1617; Rev. Sts. Mass. c. 136, § 31; Gen. Stat. c. 171, § 31; *State v. Farr*, 12 Rich. 24. What particularity is necessary in setting forth the name and addition of the defendant has been already considered. See *supra*, notes to form 2. Any misnomer, in general, is matter for abatement. *Ibid.* *State v. Lorey*, 2 Brev. 395; *Lynes v. State*, 5 Port. 236.

Want of addition is at common law ground for abatement, though the proper course is motion to quash. *State v. Hughes*, 2 Har. & McH. 479; 1 Chit. C. L. 204. See *State v. Newman*, 2 Car. Law Rep. 74. But a wrong addition is only to be met by plea in abatement. *Supra*, notes to form 2. *State v. Bishop*, 15 Me. 122. See *Com. v. Clark*, 2 Va. Cas. 401. The plea, however, must supply the true addition. *R. v. Checkets*, 6 M. & S. 88.

If a plea of misnomer be put in, the usual course is to reindict the defendant by the new name, without pushing the old bill further. 2 Hale, 176, 238; Burn. Indictment ix.; Williams, J., Misnomer and Addition, ii.; Dick. Quart. Sess. 167. The prosecutor may, however, if he think fit, deny the plea, or reply that the defendant is known as well by one Christian name or surname as another, and, if he succeed, judgment will be given for the prosecution. 2 Leach, 476; 2 Hale, 237, 238; Cro. C. C. 21. See form, 2 Hale, 237; *State v. Dresser*, 54 Me. 569; *Lewis v. State*, 1 Head, 329. See, as to practice and evidence, *Com. v. Gale*, 11 Gray, 320. Or the prosecutor may demur to the plea, and the demurrer and joinder may be *ore tenus*. Foster, 105; 1 Leach, 476. If an issue of fact be raised, the venire may be returned, and the trial of the point by a jury of the same county proceed *instantly*. 2 Leach, 478; 2 Hale, 238; 22 Hen. 8. c. 14; 28 Hen. 8. c. 1; 32 Hen. 8. c. 3; 3 Inst. 27; Starkie, 296. If judgment be found for the defendant, on the issue of misnomer, this is no bar to an indictment for the same offence in his true name. *Com. v. Farrell*, 105 Mass. 189; *State v. Robinson*, 2 Lea, 114.

It is not a good replication that the defendant is the same person mentioned in the indictment. *Com. v. Dockham*, Thach. C. C. 238.

Two pleas in abatement, when not repugnant, may be pleaded at the same time, though in strict practice one should be disposed of before the other is tried. *Com. v. Long*, 2 Va. Cases, 318.

A plea in abatement is a dilatory plea, and must be pleaded with strict exactness. *O'Connell v. R.*, 11 Cl. & Fin. 155; 9 Jurist, 25; *Dolan v. People*, 64 N. Y. 485. See *State v. Homer*, 40 Me. 438; *State v. Brooks*, 9 Ala. 10.

(e) Arch. C. P. 91; Stark. C. P. 473.

J., to wit, at the parish aforesaid, in the county aforesaid, and by the Christian name of J. has always since his baptism hitherto been called or known; without this, that he the said J. L. now is or at any time hitherto hath been called or known by the Christian name of G., as by the said indictment is supposed; and this he the said J. L. is ready to verify; wherefore he prays judgment of the said indictment, and that the same may be quashed, etc.

(1143) *Replication to the above plea.*(f)

And hereupon J. N., Esq., attorney-general in the said state, who prosecutes for the said state in this behalf, says, that the said indictment, by reason of anything by the said J. L., in his said plea above alleged, ought not to be quashed; because he says that the said J. L., long before and at the time of the preferring of the said indictment, was and still is known as well by the name of G. L. as by the name of J. L., to wit, at the parish aforesaid, in the county aforesaid; and this he, the said J. N., prays may be inquired of by the country, etc.

(1144) *Plea of a wrong addition.*(g)

And the said A. B., who in and by the said indictment is called by the name and addition, "A. B., late of the parish of K., in the county of M., yeoman," in his own person comes, and having heard the said indictment read, says, that at the time of the taking the said indictment, and long before, he the said A. B. was and ever since hath been and still is inhabiting, commorant, and resident in the parish of St. James, in the liberty of Westminster, in the said county of M.; without this, that he the said A. B. now is or at the taking of the said indictment, or at any time before, was inhabiting, resident, or commorant at the parish of K., in the said county of M.; and this he is ready to verify; wherefore, and because he the said A. B. is not called in the said indictment "A. B., late of the parish of St. James, in the liberty of Westminster," he the said A. B. prays judgment of the said indictment, and that the same may be quashed.

(f) Arch. C. P. 100.

(g) Stark C. P. 473. A plea of misnomer should commence thus, "Whereupon cometh R. W., who is indicted by the name of J. W.," and if he should say "the said J. W.," he would be concluded. Stark. C. P. 473; 2 Hale, 175

(1145) *Plea to the jurisdiction.*(*h*)

And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment read, says, that the said court here ought not to take cognizance of the (trespass and assault) in the said indictment above specified; because, protesting that he is not guilty of the same, nevertheless the said J. S. says, that, etc. (*so proceeding to state the matter of the plea. See the precedents, 1 Went. 10-18; 4 Went. 63. Conclude thus*): And this he the said J. S. is ready to verify; wherefore he prays judgment if the said court now here will or ought to take cognizance of the indictment aforesaid; and that by the court here he may be dismissed or discharged, etc.

(1146) *Replication to the above plea.*(*i*)

And hereupon J. N., attorney-general, etc., who prosecutes for the said state in this behalf, says, that, notwithstanding anything by the said J. S. above in pleading alleged, this court ought not to be precluded from taking cognizance of the indictment aforesaid; because he says that, etc. (*stating the matter of the replication*). And this he the said J. N. prays may be inquired of by the country, etc. (*Or if it conclude with a verification, then thus*): And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may answer to the said indictment.

(1147) *Special pleas generally.*(*j*)

And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment (*or information*) read,

(*h*) Arch. C. P. 98. Where an indictment is taken before a court that has no cognizance of the offence, the defendant may plead to the jurisdiction, without answering at all to the crime alleged. 2 Hale, 286. As, if a man be indicted for treason at the quarter sessions, or for rape at the sheriff's tourn, or the like. Ibid. Or, if another court have exclusive jurisdiction of the offence. Such pleas are not common, the easier and simpler course being writ of error or arrest of judgment. 4 Bl. Com. 383. See for a plea of this class, *Adams v. People*, 1 Comst. 173; 1 Denio, 190.

(*i*) Arch. C. P. 99.

(*j*) Ib. 105. Special pleas, with the exception of pleas to the jurisdiction, pleas of abatement, and pleas of *autrefois acquit*, but rarely occur in practice, as in general they amount in character to the general issue. Thus, the plea of non-identity, which is pleaded *ore tenus*, is never allowed, except in cases where the prisoner has escaped after verdict and before judgment, or after judgment and

says, that the said state ought not further to prosecute the said indictment against him the said J. S.; because he says that, etc. (*so proceeding to state the matter of the plea, and concluding thus*): And this he the said J. S. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment above specified.

(1148) *Replication.*(k)

And hereupon J. N., attorney-general, etc., who prosecutes for the said state in this behalf, says, by reason of anything in the said plea of the said J. S. above pleaded in bar alleged, the said state ought not to be precluded from prosecuting the said indictment against the said J. S.; because he says that, etc. (*so pro-*

before execution. On review, to render the plea valid, the record must show an escape. *Thomas v. State*, 5 How. Miss. R. 20. The plea of insanity, under statutes presenting a particular procedure in such cases may be special. Wh. Cr. L. 8th ed. §§ 57-8.

Special pleas as to constitution of grand jury must be good on their face. Wh. Cr. Pl. & Pr. §§ 344, 350, 352, 357, 430. Thus where, on a presentment for gaming, the defendant pleaded in abatement that the clerk *de facto*, who administered the oath to the grand jury that made the presentment, was not clerk *de jure* at the time, it was held the plea was bad. *Hord v. Com.*, 4 Leigh, 647. (See Wh. Cr. Pl. & Pr. §§ 344, 350, 352 *et seq.*) For form see *infra*, 1158.

The pendency of an indictment is no ground for a plea in abatement to another indictment in the same court for the same cause. *Com. v. Drew*, 3 Cush. 279; *State v. Tisdale*, 2 Dev. & Bat. 159.

A plea in abatement, or a special plea, not involving a statement of fact, is exclusively for the court. *Chase v. State*, 46 Miss. 683.

When the prosecution is sustained in an objection to a special plea, on the ground that it is defective, this is in substance a judgment for the prosecution as if on demurrer. *Com. v. Lanman*, 13 Allen, 563.

Plea of pardon. An amnesty or statutory act of grace and oblivion, need not be specially pleaded. 2 Hawk. P. C. 37, s. 58.

If a public act, the courts, under such circumstances, are bound to take notice of it. See *State v. Keith*, 63 N. C. 140; *State v. Blalock*, Phill. N. C. 242. But it is more prudent specially to plead an act of amnesty, since, if the court should refuse to receive it under the general issue, the error might be too late to be repaired. See *State v. Cook*, Phill. N. C. 535; *State v. Shelton*, 65 N. C. 294.

An executive pardon should be specially pleaded, and should be produced under the great seal. It is said that it may be orally pleaded. *R. v. Garside*, 4 N. & M. 33; 2 Ad. & El. 266. But it is better that it should be pleaded formally in writing. Unless specially pleaded, it will not be noticed by the court. *U. S. v. Wilson*, 7 Pet. 150; Bald. 78; *State v. Blalock*, Phill. N. C. 242; *Com. v. Shisler*, 2 Phila. 256. And it may be pleaded at any period of the case, whenever it is received. *R. v. Morris*, L. C. 1 C. C. 92. Though if not pleaded, it will not, as has been seen, be noticed in arrest of judgment. *U. S. v. Wilson*, *ut supra*; *Com. v. Lockwood*, 100 Miss. 339. As to pardons, see more fully Wh. Cr. Pl. & Pr. § 521 *et seq.*

(k) *Ib.*

ceeding to state the matter of the replication, and conclude thus): And this he the said J. N. prays may be inquired of by the country. (*Or if it conclude with a verification, then thus):* And this he the said J. N. is ready to verify; wherefore he prays judgment, and that the said J. S. may be convicted of the premises in the said indictment above specified.

(1149) *Rejoinder.(l)*

And the said J. S., as to the said replication of the said J. N. to the said plea by him the said J. S. pleaded, says, that the said state, by reason of anything by the said J. N. in that replication alleged, ought not further to prosecute the said indictment against him the said J. S.; because he saith that, etc. (*so proceeding to state the matter of the rejoinder, and concluding thus):* And of this he the said S. puts himself upon the country. (*Or if it be necessary to conclude with a verification, the conclusion may be in the same form as in a plea.*)

AUTREFOIS ACQUIT, ETC.(m)

(1150) *Plea of autrefois acquit.(n)*

And the said William Sheen, being brought to the bar of this court, and having heard the said indictment read and the matters

[(l), Arch. C. P. 106.

(m) The former conviction or acquittal must be specially pleaded. *Com. v. Chesley*, 107 Mass. 223; *State v. Washington*, 28 La. An. 129; though see *Clem v. State*, 42 Ind. 420. That it is not matter for arrest of judgment, see *State v. Barnes*, 32 Me. 530; *State v. Salge*, 2 Nev. 321.

When *autrefois acquit* and *not guilty* are pleaded together, the former must be tried first. *Com. v. Merrill*, 8 Allen, 545; *Foster v. State*, 39 Ala. 229; *Solliday v. Com.*, 28 Penn. St. 13; *Clem v. State*, 42 Ind. 421; *Davis v. State*, 42 Tex. 494. But see *Faulk v. State*, 52 Ala. 415. In strict practice, the two pleas cannot be concurrently pleaded. *R. v. Roche*, 1 Leach C. C. 135.

A verdict of guilty on the two pleas jointly is bad. *Mountain v. State*, 40 Ala. 344, and so, when tried together, of a verdict upon one plea alone. *Solliday v. Com.*, 28 Penn. St. 13; *Nonemaker v. State*, 34 Ala. 211. See, as to waiver, *Dominic v. State*, 40 Ala. 680.

The plea must consist of two matters: first, matter of record, to wit, the former indictment and acquittal, or conviction; second, of matters of fact, to wit, the identity of the person acquitted, and of the offence of which he was acquitted. 2 Hale P. C. 241; Hawk. b. 2, c. 35, s. 3; Burn, J., *Indictment*, xi.; 1 M. & S. 188; 9 East, 438; 2 Leach, 712; 4 Co. Rep. 44; *Com. v. Myers*, 3 Wheel. C. C. 550; *Smith v. State*, 52 Ala. 407; *Rocco v. State*, 37 Miss. 357; *Austin v. State*, 2 Mo. 393; *State v. Cheek*, 63 Mo. 364.

In Massachusetts, by Gen. Stat. 1864, c. 250, § 4, it is sufficient in *autrefois acquit* or *convict* to set forth simply a prior lawful acquittal or conviction.

The proceedings on the first trial must have been regular, and the court must

have had jurisdiction; and this must appear on the face of the plea. 4 Black. Com. 335; 2 Hawk. C. 35; Wh. Cr. Pl. & Pr. § 480; Com. v. Sutherland, 109 Mass. 342. To sustain the issues of fact involved (*e. g.*, identity of offender or of offence), the defendant has the burden on him to make out his case by preponderance of proof. Wh. Cr. Ev. § 593. Com. v. Daley, 4 Gray, 209; Bainbridge v. State, 30 Oh. St. 264; Cooper v. State, 47 Ind. 61; State v. Small, 31 Mo. 197; State v. Moore, 66 Mo. 372; though see State v. Smith, 22 Vt. 74; Wh. Cr. Ev. § 593. As to identity of defendant, see R. v. Crofts, 9 C. & P. 219; as to identity of offence, Wh. Cr. Pl. & Pr. § 483.

In cases of dispute, parol testimony is admissible to prove (what the record cannot sufficiently show) that the offences were or were not identical. Wh. Cr. Ev. § 693; 2 Russ. 721, *n.*; R. v. Parry, 7 C. & P. 836; R. v. Bird, 2 Den. C. C. 94; 5 Cox C. C. 20; Flitters v. R. 10 C. P. 29; Com. v. Daley, 4 Gray, 209; Com. v. Dillane, 11 Gray, 67; People v. McGowen, 17 Wend. 386; Porter v. State, 17 Ind. 415; Duncan v. Com., 6 Dana, 295; Page v. Com., 27 Grat. 954; State v. Andrews, 27 Mo. 267; State v. Small, 31 Mo. 197; State v. Thornton, 37 Mo. 360; Hozier v. State, 6 Tex. App. 501.

An acquittal, even without judgment, is a bar, and may be pleaded as such. State v. Elden, 41 Me. 165; West v. State, 2 Zab. 212; R. v. Reed, 1 Eng. L. & Eq. R. 595. See 2 Russ. on Cr. 4th ed. 64, note.

A conviction, however (unless in cases where, as will be hereafter seen, the plea of once in jeopardy applies), is not necessarily a bar, without judgment. U. S. v. Herbert, 5 Cranch C. C. R. 87; Coleman v. U. S., 97 U. S. 530; Com. v. Fraher, 126 Mass. 265; West v. State, 2 Zab. 212; Penn. v. Huffman, Addis. 140; State v. Mount, 14 Ohio, 295; Brennan v. People, 15 Ill. 511; State v. Norvell, 2 Yerg. 24; State v. Spear, 6 Mo. 644; Lewis v. State, 1 Tex. App. 323; though see Preston v. State, 25 Miss. 383; Ratzky v. People, 29 N. Y. 124. See for illustrations, Wh. Cr. Pl. & Pr. § 435.

But, ordinarily, in cases in which the former procedure is not abandoned and vacated by the prosecution, a verdict of guilty will sustain the plea. State v. Parish, 43 Wis. 395. A plea of guilty may be by itself a bar. People v. Goldstein, 32 Cal. 432.

If the plea on its face is defective, it may be demurred to; or, if there be a second variance, advantage may be taken by the plea *nul tiel record*. R. v. Bowman, 6 C. & P. 101, 337; Hite v. State, 9 Yerg. 357; McQuoid v. People, 3 Gilm. 76. For demurrer see *infra*, 1165.

Wherever the offences charged in the two indictments are capable of being legally identified as the same offence by averments, it is a question of fact for a jury to determine whether the averments be supported and the offences be the same. In such cases the replication ought to conclude to the country. But when the plea of *autrefois acquit* upon its face shows that the offences are legally distinct, and incapable of identification by averments, the replication of *nul tiel record* may conclude with a verification. In the latter case the court, without the intervention of a jury, decides the issue. Hite v. State, 9 Yerg. 357; see State v. Haynes, 36 Vt. 667; Marthe v. State, 26 Ala. 72.

A replication of fraud, well pleaded, is good on demurrer. State v. Little, 1 N. H. 257; State v. Brown, 16 Conn. 54; State v. Reed, 26 Conn. 202; Com. v. Jackson, 2 Va. Cas. 501; State v. Clenny, 1 Head, 270.

The burden of replication of fraud is on the prosecution. Wh. Cr. Pl. & Pr. § 483. When there is no replication, a similate is presumed. Swepson v. State, 81 N. C. 591.

A *novel assignment* is not admissible in a criminal case, and the proper mode of replying to a plea of a former conviction is to traverse the alleged identity. Duncan v. Com., 6 Dana, 295.

To an indictment for larceny in a dwelling-house, the defendant pleaded a former conviction of pilfering, on a complaint before a police court, averring that the articles and the stealing mentioned in the indictment were the same mentioned in said complaint, and that the police court had jurisdiction of the offence. The

replication averred that the stealing charged in the said complaint was a larceny in the dwelling-house, which was a high and aggravated crime, and that the police court had not jurisdiction thereof. The rejoinder traversed the several averments in the replication. It was held, on special demurrer, that the rejoinder was good, being neither a departure, nor double, and that though the plea was defective in form, for not directly traversing the charge of larceny in a dwelling-house, yet that the defect was cured by the pleading over. *Com. v. Curtis*, 11 Pick. 134. The proper plea would have been former conviction of the larceny, and not guilty of the residue of the charge. *Ibid.*

When the plea of *autrefois acquit* or *convict* is determined against the defendant, in this country, in most cases he is allowed to plead over, and to have his trial for the offence itself. *Com. v. Goddard*, 13 Mass. 455; *Barge v. Com.*, 3 Penrose & Watts, 262; *Foster v. Com.*, 8 Watts & S. 77; *Hirn v. State*, 1 Oh. St. R. 16; *Falkner v. State*, 3 Heisk. 33. As to English practice, see Wh. Cr. Pl. & Pr. § 486.

(u) For the form in the text see *R. v. Sheen*, 2 C. & P. 634. In this case the following proceedings took place:—

“R. N. Cresswell, for the prisoner, then said, ‘And the said William Sheen the younger doth the like.’

“The prisoner’s counsel asked if they might add to this plea that the prisoner was also acquitted on the coroner’s inquisition, in which the deceased was described as Charles William Sheen.

“Burrough, J.—If the prisoner by his plea insists on two records, his plea would be double; but if in the course of the case it shall appear that he ought to have pleaded his acquittal on the inquisition, I will take care that he shall not be prejudiced. The court awarded a venire returnable instantan. And the sheriff having made his return forthwith, and the jury having been sworn,—

“R. N. Cresswell, for the prisoner, opened his case to the jury in support of the plea, and put in an examined copy of the register of baptisms of the parish of St. George the Martyr, Southwark, in which the baptism of the deceased was entered ‘Charles William, the son of Lydia Beadle,’ etc.

“A witness was called, who proved the identity of the child, whose mother was an unmarried woman named Lydia Beadle, whom the prisoner had married after the birth of the deceased. The witness stated that the deceased infant was always called William or Billy, but that she should have known him by the name of Charles William Beadle, and if any one had inquired for him by that name, she would have known who was meant. And the prisoner’s father stated that the child’s name was Charles William Sheen, but that he had never heard him called so.

“Andrews, serjeant, addressed the jury on the part of the prosecution. Recited the case of *Rex v. Clarke*, and called two witnesses, one of whom had been told by the mother of the deceased that his name was William, and the other had never heard the deceased called either, or spoken of by any name at all.

“Clarkson, for the prisoner, replied. Burrough, J. (in summing up): The question on this issue is, whether the deceased was as well known by the name of Charles William Beadle as by any of the names and descriptions in the present indictment, and I ought to say, that if the prisoner could have been convicted on the former indictment, he must be acquitted now. And whether at the former trial the proper evidence was adduced before the jury or not is immaterial, for if by any possible evidence that could have been produced he could have been convicted on that indictment, he is now entitled to be acquitted.

“The first evidence we have is the register, and, looking at that, would not every one have called the child Charles William Beadle? and it is proved by one of the witnesses that she would have known him by that name. It cannot be necessary that all the world should know the child by that name, because children of so tender an age are hardly known at all, and are generally called by a Christian name only. If, however, you should think that the name of the de-

therein contained, says, that he ought not to be put to answer the said indictment, he having been heretofore in due manner of law acquitted of the premises in and by the said indictment above specified and charged upon him; and for plea to the said indictment he says, that heretofore, to wit, at, etc. (*here set forth the caption of the session verbatim*), he the said William Sheen was duly arraigned upon a certain indictment which charged him the said William Sheen by the name and description of William Sheen, late, etc., in the county of laborer; not having the fear, etc. (*here set forth the former indictment verbatim*), to which said last mentioned indictment he did then and there plead not guilty, and thereupon a jury then and there duly summoned, empanelled, and sworn to try the said issue so joined between the said state and the said William Sheen, upon their oaths did say, that the said William Sheen was not guilty of the said felony and murder by the said indictment supposed and laid to his charge; whereupon it was then and there considered by the said court that the said William Sheen should go thereof acquitted, without day, as appears by the records of the said proceedings now remaining here in court. And the said William Sheen avers, that the said William Sheen mentioned in the former indictment, and he the said William Sheen who is charged by this present indictment, are one and the same person and not divers and different persons, and that the said infant mentioned in the said first indictment, and the male child in this present indictment mentioned, are one and the same male child and not

ceased was Charles William Sheen, I wish you would inform me of it by your verdict, because it is agreed that as that is the name in the coroner's inquisition, the prisoner should derive the same advantage from the course he has taken, as if he had pleaded his acquittal in that inquisition; my brother Littledale suggests to me, that if a legacy had been left to this child by the name of Charles William Beadle, he would have taken it upon this evidence, and if this evidence of the child's name had been given at the former trial, I think the prisoner should have been convicted. The case of *Rex v. Clarke* has been cited, but in that case there was an entire absence of evidence as to the surname of the deceased. If you think that in the present case the name of the deceased was either Charles William Beadle or Charles William Sheen, or if you think that he was known at all by those names, or either of those names, you ought to find a verdict for the prisoner.

“The jury found, that the deceased was as well known by the name of Charles William Beadle as by any of the other names.

“Burrough, J.—There must be judgment for the prisoner. We are obliged to Mr. Cresswell for drawing that plea; it was very properly done.”

divers and different children ; and the said William Sheen further avers, that the felony and murder in the said former mentioned indictment mentioned, and the felony and murder in this present indictment mentioned, are one and the same felony and murder and not divers and different felonies and murders. And the said William Sheen further avers, that the said male child described by the name of Charles William Beadle, in the said former indictment mentioned, was as well known by the said name of Charles William Beadle as by any of the several names and descriptions of Charles William, William, Billy, Charles, or William Sheen, or a certain male child, or a certain male bastard child, as he is in and by the present indictment described ; and this he is ready to verify ; wherefore he the said William Sheen prays the judgment of the court here, if he ought to be put further to answer this present indictment ; and whether the said state ought further to prosecute or impeach him the said William Sheen on account of the premises in this present indictment contained ; and that he may be dismissed the court and go without day.(o)

(1151) *Autrefois acquit, another form.*(p)

And the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, in their own proper persons, now come into court here, and having heard the said indictment read and the matters therein contained, say, that they ought not to be put to answer the said indictment, they having been heretofore, in due manner of law, acquitted of the premises in and by the said indictment above specified and charged upon them ; and for plea to the said indictment they say, that the said ought not further to prosecute the said indictment against them, because they say, that heretofore, to wit, at the (*here set forth the caption of the court, verbatim*), the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, stood indicted, and were duly arraigned upon a certain indictment which charged the said Robert Courtice Bird, and the said Sarah, the said wife of the said

(o) For replication, see *post* (1152).

(p) This form was sustained in *R. v. Bird* (5 Cox, C. C. 12 ; 2 Eng. Law and Eq. Rep. 440 ; 1 Temple & Mew, C. C. 438, note).

Robert Courtice Bird, by the names and descriptions of Robert Courtice Bird, late of the parish of Buckland Brewer, in the county of Devon, laborer, and Sarah, the wife of the said Robert Courtice Bird, late of the same parish, for that the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, etc. (*setting out the indictment in full*). And the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, further say, that the said felony and murder so charged upon them in the said last mentioned indictment as aforesaid, included divers assaults therein supposed and alleged to have been made and committed by the said Robert Courtice Bird, and the said Sarah, the wife of the said Robert Courtice Bird, against the person of the said Mary Ann Parsons, in the said indictment named. And the said Robert Courtice Bird, and the said Sarah, the wife of the said Robert Courtice Bird, further say, that they did then and there respectively plead not guilty to the said last mentioned indictment, and that they were thereupon then and there, in due form of law, respectively tried upon the said last mentioned indictment by a jury of the said county, then and there in due form of law summoned, empanelled, and sworn to speak the truth of and concerning the premises in the said last mentioned indictment mentioned, and to try the said issues so joined between our sovereign lady the queen and the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, respectively as aforesaid, and which said jury upon their oaths did then and there say, that the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, respectively were not guilty of the premises in the said last mentioned indictment specified and charged on them respectively as aforesaid, as the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, by their pleas to the said last mentioned indictment respectively alleged, whereupon it was then and there considered by the said last mentioned court that the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, of the premises aforesaid, in the said last mentioned indictment specified and charged on them respectively as aforesaid, should be discharged and go acquitted thereof without day, as by the record of the said proceed-

ings now here appears. And the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, further say, that the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, now here pleading, and the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, in the indictment aforesaid named and thereof acquitted as aforesaid, are respectively the same identical persons respectively, and not other or different persons respectively, and that the said Mary Ann Parsons, in the said last-mentioned indictment named, is the same identical Mary Ann Parsons as is named in the indictment to which the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, are now here pleading; and that the said assaults so included in the said felony and murder so charged upon the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, in the said indictment in this plea mentioned in this behalf, and therein supposed and alleged to have been made and committed by them against the person of the said Mary Ann Parsons as aforesaid, are the same identical assaults, beatings, ill-treatings, and woundings respectively as in the said indictment to which the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, now here pleading, are respectively supposed and alleged to have been made, done, given, and committed respectively by the said Robert Courtice Bird, and the said Sarah, the said wife of the said Robert Courtice Bird, respectively, and not other or different. Wherefore, they pray judgment of the court here, whether the said will or ought further to prosecute, impeach, or charge them, on account of the premises in the said indictment, to which they are now here pleading, contained and specified, and whether they ought to answer thereto respectively, and that they may be dismissed this court without day.

(1152) *Replication to autrefois acquit.*(q) (*To be made ore tenus.*)

And J. K., Esq., who for the said prosecutes on this

(q) *R. v. Sheen*, 2 C. & P. 634; *ante* (1150). Where on the record the offence set forth in the first indictment is substantially the same as that set forth in the second, and where there is no averment of identity of offence, the proper course is to demur.

behalf, says, that the said ought not to be barred from further prosecuting the said indictment, because he saith that the said W. S. was not heretofore acquitted of the premises charged in and upon him by this present indictment; for although true it is that the said W. S. was acquitted upon the said indictment in this said plea mentioned, and although true it is that the said infant in the said former indictment mentioned, and the male child in this present indictment mentioned, are the same child and not another and different child, yet for replication in this behalf he says, that the said male child was not known as well by the name of C. W. B. as by any or either of the several names by which he is named in the present indictment; and this the said J. K., Esq., on behalf of the said prays may be inquired of by the country.

(1153) *Plea that defendant was duly charged, examined, and tried for the murder of the deceased before a court legally constituted, and upon this trial and examination was duly and legally acquitted of the said murder and felony with which he stood charged, and was adjudged by the court not guilty thereof.(r)*

And the said S. M. for plea (by leave of the court), saith, that he ought not now to be charged with the murder and felony aforesaid, charged upon him in the indictment aforesaid, because he saith that he the said S. M., by the name and description of S. M., heretofore, to wit, at a court of aldermen of the borough of Norfolk, summoned according to law for the examination of the said S. M., for the murder and felony aforesaid, and held on the thirty-first day of May, in the year of our Lord one thousand eight hundred and eleven, at the court-house of the borough aforesaid, before W. B. L., mayor, J. N., recorder, W. V., L. W., M. K., J. E. H., R. E. L., and M. K. Jr., aldermen of the said borough, was duly charged, examined, and tried for having, on the twenty-fifth day of May, one thousand eight hundred and eleven, between the hours of six and eight o'clock of the morning of that day, in the stone-house of L. B., in the said borough of Norfolk, feloniously, wilfully, and of his malice aforethought,

(r) This plea was held good in *Com. v. Myers*, 1 Va. Cases, 249.

killed and murdered the said R. B., who was then and there in the peace of God and of the commonwealth, and that he the said S. M., upon this trial and examination, was duly and legally acquitted by the said court of the said murder and felony with which he was then and there so charged, and was adjudged by the said court not to be guilty thereof; and this he the said S. M. is ready to verify and prove by the record of the said borough court of Norfolk. And the said S. M. further saith, that the said R. B. named in the said indictment, and the said R. B. named in the said record of acquittal, are one and the same, and not different persons; that he the said S. M. named in the said indictment, and the said S. M. named in the said record and acquittal as aforesaid by the said court of the felony and murder aforesaid, are one and the same, and not different persons, and that the felony and murder charged upon him the said S. M. before the said court, and the felony and murder charged upon him the said S. M. in the indictment aforesaid, are one and the same, and not different felonies; and this he is ready to verify; wherefore, since he the said S. M. hath already been heretofore acquitted of the felony and murder of the said R. B. aforesaid, he prays the judgment of the court here, if he the said S. M. should be charged again with the same felony and murder of which he hath once already at another time been acquitted.

(1154) *Autrefois convict, plea of, where the original indictment on which the defendant was convicted was one for arson, and the second indictment was for murder in burning a house whereby one J. H. was killed, etc.(s)*

And the said S. C., in his own proper person, cometh into court here, and having heard the said indictment read, saith, that

(s) *State v. Cooper*, 1 Green, 375. The indictment on which the above proceeding took place is to be found *supra*, 126. "The defendant," said the court, "has been convicted of the crime of arson. He has plead that conviction in bar of the indictment for murder. What effect shall that plea have upon this prosecution? If I am right in supposing that the defendant cannot be convicted and punished for two distinct felonies, growing out of the same identical act, and where one is a necessary ingredient in the other, and the state has selected and prosecuted one to conviction, it appears to present a proper case to interpose the lenign principle, that a man shall not be twice put in jeopardy for the same cause, in favor of the life of the defendant.

"Judge Blackstone, in his Commentaries, says, that 'a conviction of man-

the said state of New Jersey ought not further to prosecute the said indictment against him, the said S. C., because, he saith, that heretofore, to wit, at a court of general quarter sessions of the peace, holden at Morristown, in and for the county of Morris, of the term of July, A. D., etc., it was by the jurors of the state of New Jersey, for the body of the county of Morris, upon their oaths presented, "that (*here recite indictment*), then, there, and thereby described as S. C., late of the township of Hanover, in the county of Morris, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of April, A. D. one thousand eight hundred and thirty, with force and arms, at the township aforesaid, in the county aforesaid, and within the jurisdiction of the said court of general quarter sessions of the peace, wilfully and maliciously did burn a certain dwelling-house of one R. S., there situate. And the jurors aforesaid, upon their oaths aforesaid, did further present, that C. C. and J. V. G., late of the

slaughter, or an appeal on an indictment, is a bar even in another appeal, and much more in an indictment of murder, for the fact prosecuted is the same in both, though the offences differ in coloring and degree.' This is well established. 4 Coke, 45, 46; 2 Hale, 246; Arch. 52; Fost. Cr. Law, 329; Hawk. b. 2, c. 36, s. 10. And in the case of Robert M. Goodwin, who was indicted for manslaughter, and subsequently for murder, Colden (mayor) fully recognizes the same principle, where he says, 'If we were to try the prisoner on the indictment for manslaughter, unquestionably we should put an end to the prosecution for murder.'

"If in civil cases the law abhors a multiplicity of suits, it is yet more watchful in criminal cases, that the crown shall not oppress the subject, or the government the citizen, by unnecessary prosecutions. Under the numerous British statutes imposing severe penalties, and even taking away the benefit of clergy from larcenies perpetrated under certain specified circumstances, it is the practice to indict the crime with all its aggravations under the statute, and if the aggravating circumstances are not proved, to convict of the simple larceny only. I have met with no instance of an attempt on the part of the crown, after indicting for a simple larceny and establishing that, to proceed by another indictment, to establish the higher offence. The cases of *R. v. Smith* (3 C. & P. 412, cited in 14 Eng. C. Law Rep. 374) and the *Com. v. Cunningham* (13 Mass. 245) are authorities against such a practice. And I am satisfied that a conviction of larceny would be a good bar to a prosecution for burglary and stealing the same goods; whatever might be its effect upon an indictment for burglary with intent to steal; as to which see 7 S. & R. 491. I consider the present case as not affected by those where the first indictment was insufficient, and where a train of decisions has established that the criminal was never legally in jeopardy from the first prosecution. 4 Coke, 44, 45; Hawk. b. 2, c. 36, s. 15; 1 Johns. Rep. 77. There is no defect in the first indictment; it is a case where the state has thought proper to prosecute the offence in its mildest form, and it is better that the residue of the offence go unpunished, than by sustaining a second indictment, to sanction a practice which might be rendered an instrument of oppression to the citizens."

township of Hanover aforesaid, in the county aforesaid, before the said arson was committed in form aforesaid, to wit, on the twelfth day of February, in the year aforesaid, with force and arms, at the township aforesaid, in the county and within the jurisdiction aforesaid, did unlawfully, wilfully, and maliciously aid, counsel, and procure the said S. C. to commit the said arson in manner and form aforesaid, against the form of the statute in such case made and provided, and against the peace of the said state of New Jersey, the government and dignity of the same."

Which said indictment is indorsed a true bill, and signed by D. J. C., Esq., as foreman, and by J. W. M., Esq., as prosecutor of the pleas, etc.

And the said S. C., in his own proper person, further saith, that at a court of oyer and terminer and general gaol delivery, holden at Morristown, in and for the county of Morris, of the term of September, A. D. one thousand eight hundred and thirty, present the Hon. G. K. D., justice, and J. U., D. T., J. S., and S. C., Esqrs., judges, he, the said S. C., together with C. C. and J. V. G., were charged on the above recited indictment for arson, and their plea to the same being demanded, they, the said S., C., and J., pleaded thereto not guilty; whereupon, the said court remanded them, the said S., C., and J., to prison. And the said S., in his own proper person, further saith, that afterwards, to wit, on Monday, the fourth day of October, A. D. one thousand eight hundred and thirty, before the said court of oyer and terminer and general gaol delivery, and in the same September term of said court, on motion of J. W. M., Esq., prosecutor of the pleas for the county of Morris, the said court ordered on the trial of the said S., C., and J., on said indictment for arson. Whereupon, the sheriff having returned a panel, the following persons appeared and were sworn, viz., A. C., etc. After hearing the testimony, and a charge from the court, the jury retired to consider of their verdict with constable S. F., sworn to attend them; after some time the said jury returned into court and said they had agreed on the verdict, and by A. C., their foreman, said they found the said S. C. guilty in manner and form as he stood charged, and as to C. C. and J. V. G. not guilty in manner and form as they stood charged, and so said they all, as by

the record thereof more fully and at large appears, which said judgment still remains in full force and effect, and not in the least reversed or made void.^(t) And the said S. C. in fact saith, that he the said S. C. and the said S. C. so indicted and convicted as last aforesaid, are one and the same person, and not other and different persons, and that the wilful and malicious burning a certain dwelling-house of one R. S. (as in the indictment for arson is mentioned, and on which he has been so as aforesaid convicted) and the wilful and malicious burning a certain dwelling-house of one R. S., whereby one J. H., in the said dwelling-house then and there being, before, at, and during the same burning, was then and there, by reason and means of the said burning so committed and done by the said S. C. in manner aforesaid, mortally burned and killed, as described in the above indictment for murder against him (in the first count thereof), are one and the same wilful and malicious burning of the dwelling-house of the said R. S., and not other and different burnings or arsons.

And the said S. C. further in fact saith, that the wilful and malicious burning a dwelling-house of one R. S., of which he the said S. C. was so indicted and convicted as aforesaid, and his contriving and intending one J. H., then being in a certain dwelling-house of one R. S., in the township and county aforesaid, feloniously, wilfully, and of his malice aforethought, to burn, kill, and murder, and his wilfully and maliciously setting fire to and burning the said dwelling-house, the said J. H. then and there, before, at, and during the said burning, being in the said dwelling-house, and that he, the said S. C., in so setting fire to and burning the said dwelling-house as aforesaid, there and then feloniously, wilfully, and of his malice aforethought, did mortally burn the body of the said J. H., by means of which said mortally burning of the body of the said J. H. as aforesaid, he the said J. H. did die, of which he is now indicted, as alleged in the second count of said indictment, are one and the same wilful and malicious burning of the dwelling-house of the said R. S., and not other and different burnings or arsons.

And of this he the said S. C. is ready to verify ; wherefore he

^(t) It would be better to add here that this conviction was lawful. *State v. Salge*, 2 Nev. 321.

prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified (*here follows plea of not guilty*).

(1155) *Demurrer to said plea.*

And J. W. M., who prosecutes for the state of New Jersey in this behalf, as to the said plea of the said S. C., by him first above pleaded, saith, that the same, and the matters therein contained in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said state from prosecuting the said indictment against him the said S. C., and that the said state is not bound by the law of the court to answer the same, and this he the said J. W. M., who prosecutes as aforesaid, is ready to verify, wherefore,—

For want of a sufficient plea in this behalf, he, the said J. W. M., for the state of New Jersey, prays judgment, and that the said S. C. may be convicted of the premises in the said indictment specified.

(1156) *Joinder in demurrer.*

And the said S. C. saith, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said state of New Jersey from prosecuting the said indictment against him the said S. C., and the said S. C. is ready to verify and prove the same as the said court here shall direct and award; wherefore, inasmuch as the said J. W. M., who prosecutes for the said state of New Jersey, hath not answered the said plea, nor hitherto in any manner denied the same, the said S. C. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

(1157) *Plea of once in jeopardy.(u)*

That on the said indictment at the said court of oyer and terminer and general gaol delivery, on Thursday, the twelfth

(u) The distinction between the plea of *autrefois acquit*, and that of *once in jeopardy* is, that the former presupposes a verdict, the latter, the discharge of the jury without verdict, and is in the nature of a plea *puis durrein continuance*.

of April aforesaid, the said defendant in due form of law was arraigned and pleaded not guilty of the premises contained in the said indictment, and for his trial put himself upon God and his country, and was by the said commonwealth in due form of law placed on his trial before a jury of the said country. And the said J. C. further says, that on the twenty-first, twenty-second, and twenty-third days of April aforesaid, the witnesses were examined in due form of law before the said court and jury, as well on behalf of the said commonwealth as him the said defendant; that the counsel for the commonwealth and the defendant then addressed the court and jury in due form of law; that on the evening of the twenty-third of April aforesaid the court charged the jury relative to the premises contained in the said indictment as set forth, and that the said jury then according to law retired to deliberate on their verdict; that on Monday the twenty-fifth day of April aforesaid, at ten o'clock in the forenoon of that day, the said jury came into the said court and answered to their names, and declared that they had not agreed upon their verdict, and that they did not think they were likely to agree upon their verdict; that two of the jury, viz., E. F. and A. H., then and there stated that they were unwell, and one of the jury, viz., E. F., then and there declared that if he were much longer

The cases in this respect may be placed in two general classes: First. Where any separation of the jury, except in case of such overruling necessity as may be considered the act of God, is held a bar to all subsequent proceedings. Secondly. Where it is held that the discharge of the jury is a matter of sound discretion for the court, and that when, in the exercise of a sound discretion, it takes place, it presents no impediment to a second trial. The cases illustrating this distinction will be found in Wh. Cr. Pl. & Pr. §§ 490 *et seq.*

It has been held that an allegation "that the said defendant had once before been put in jeopardy of his life for said offence, upon said indictment," is demurrable, if it does not show how or in what manner; though it is otherwise if the facts constituting the jeopardy are alleged. *Atkins v. State*, 16 Ark. 568; *Wilson v. State*, 16 Ark. 60.

When the record shows, in a case in which jeopardy attaches, that the jury was discharged, the record must also specially state the ground of discharge, so that the court in error may understand the ground of discharge. See *Com. v. Purchase*, 2 Pick. 521; *Com. v. Townsend*, 5 Allen, 216; *People v. Goodwin*, 18 Johns. 187; *Dobbins v. State*, 14 Oh. St. 493; *Poage v. State*, 3 Oh. St. 230; *Dobbins v. State*, 14 Oh. St. 494; *Hines v. State*, 24 Oh. St. 134; *State v. Walker*, 26 Ind. 347; *State v. Nelson*, 26 Ind. 366; *State v. Bullock*, 63 N. C. 571; *State v. Almon*, 64 N. C. 364; *State v. Jefferson*, 66 N. C. 309; *Avery v. State*, 26 Ga. 233; *Powell v. State*, 19 Ala. 577; *Barrett v. State*, 35 Ala. 466; *McLaughlin, ex parte*, 41 Cal. 211; *Cage, ex parte*, 45 Cal. 248; *People v. Cage*, 48 Cal. 323; *People v. Lightfoot*, 49 Cal. 226; *Moseley v. State*, 33 Tex. 67.

confined in his present state of privation his life would be endangered; that one of the jury, E. F., being duly sworn before the said court, declared that he was seventy-six years of age, that the health of him the said E. F. was greatly impaired by an attack of illness from which he the said E. F. had only been relieved about a month, that he the said E. F., from his peculiar state of privation and suffering, was so ill and feeble that he could not walk into court without assistance, and that he the said E. F. firmly believed, that, if he should be compelled to continue on the said jury any further length of time under his then state of privation and restriction, the life of him the said E. F. would be in danger; and A. H., another of the said jury, being duly affirmed according to law, declared that he was then quite ill, that he had been confined all the month of December then next preceding with bilious fever; that the effects of this attack still left his frame debilitated, and that he firmly believed that his health would be in danger by being kept longer on the jury under his then state of privation and restriction, as ordered by the court; that the jury were then ordered by the court to withdraw to their room where they had been deliberating, and Dr. J. K., a physician of great respectability, was then and there directed by the court to visit the said jurors who alleged that they were sick; that the said Dr. J. K. did so visit the jurors in their room, in the absence of the defendant and his counsel, and without their consent, and returned to the said court, and being then for the first time sworn, did depose that he had attended the said E. F. about a month previous to the said time, the said E. F. having then a disease of the brain, and that the life of the said E. F. would, in the opinion of the said J. K., be endangered by a continuance of his present state of privation and restriction, as it might produce a return of the disease; and the said Dr. J. K. then and there further deposed, as his opinion to the said court, that the life of the said A. H. was not in immediate danger, but that he was ill, and that his health would be endangered if he continued to remain in his present state of privation and restriction. And the said J. C. further says, that at half-past twelve o'clock in the afternoon of the same day, the said court ordered the said jury to be brought into court, and the said jury being then and there asked if they had agreed upon

their verdict, answered that they had not. And the said court then and there, without and against the consent of the said J. C., ordered the said jury to be dismissed, the said court declaring, then and there, their opinion that a case of necessity for the discharge of the said jury, as contemplated by the supreme court of this commonwealth, in the case of *The Commonwealth v. Cook*, had been made to appear. And the said J. C. further says, that during all this time, viz., from Saturday, the twenty-third of April, from half-past ten o'clock in the evening of that day, until Monday, the twenty-fifth day of April, at half-past twelve o'clock in the afternoon of that day, the said jury were kept by order of the said court without meat or drink, but had the use of fire and candles, and that during the trial the said jury were allowed to eat and drink. And the said J. C. further says, that after the said jury had been without meat or drink for the space of twenty-four hours, the said court then and there, after asking the consent of the commonwealth and the defendant, authorized the said jury to take some refreshment, if a majority of the said jury would agree to the same; but that a majority of the jury would not agree to the taking of such refreshment at that time, until the verdict was agreed upon; after which declaration the court refused to grant permission to any one of the said jury to take any food or refreshment whatever. And the said J. C. further says, that during the time of the privations and restrictions of the said jury, the said defendant prayed the said court that the said jury or any of them might take food and refreshments; and after the declaration of the said jurors that they were sick, the said defendant then prayed that the said sick jurors might be allowed food and refreshment. All which said praying of the said defendant the said court then and there refused. And the said J. C. further says, that he the said J. C. now here pleading, and the said J. C. in the said indictment last mentioned, is the same identical person, etc.(v)

(v) The authorities bearing on this species of plea are collected in Wh. Cr. Pl. & Pr. § 490 *et seq.*; and it was there shown, that, while the federal courts and the courts of Massachusetts, New York, Mississippi, and Kentucky, hold that the discharge of a jury in a previous trial for a capital offence is no bar to subsequent proceedings, the courts of Pennsylvania, North Carolina, Tennessee, and perhaps of Alabama, maintain the doctrine that where a prisoner in such case is

(1158) *Plea that six of the grand jurors, by whom the bill was found, were not duly qualified.*(w)

That J. N. C., R. M. C. S., H. B., J. F., T. J. H., and J. B., six of the grand jurors by whom the said indictment was found and returned into the said court at the said April term thereof, were not all of them the above named six grand jurors, nor any one of them, at the time they so acted and at the time the said indictment was found and returned, duly and legally qualified to act as such grand jurors; in this, they the said six grand jurors, nor any one of them, had not then and there been drawn by the clerk and sheriff of the county of Warren aforesaid, either at a regular term of the said circuit court (next preceding the said April term of the said circuit court), there in open court, or by the said clerk and sheriff and in the presence of the judge of probate of the county of Warren aforesaid, sixty days next before the said April term of the said circuit court of the county of Warren aforesaid, as jurors liable to serve out for the first week of the aforesaid circuit court, at the said April term thereof, then and there from a list of the names of all the freeholders (being citizens of the United States), and householders of the county of Warren aforesaid, as liable to serve as jurors in the circuit court of the county of Warren aforesaid, as returned either in term time of the said circuit court or to the clerk thereof at his office in vacation, by the assessor of taxes of the county of Warren aforesaid; nor were all of them the above named six grand jurors, nor was any one of them, then and there summoned as persons liable to serve as jurors for the first week of the said April term of the said circuit court of Warren county aforesaid, then and there by virtue of a special writ of *venire facias* then and there awarded by the said circuit court at the said April term thereof, directing the said sheriff of the said county of Warren to summon persons there

once on trial he is in jeopardy within the meaning of the constitution, and can not be retried.

The arguments in favor of the position assumed in the latter cases, are powerfully expressed by Gibson, C. J., in *Com. v. Clue*, 3 Rawle, 498, the case from which the plea in the text is taken.

(w) *State v. Rawlins*, 8 Sm. & M. 600; Wh. Cr. Pl. & Pr. §§ 344 *et seq.*, 350, 406.

liable to serve as jurors at the said April term of the said circuit court, for the first week thereof; nor were all or any of the above named six grand jurors then and there summoned as tales jurors by the said sheriff, as liable to serve as such jurors for the first week of the said term of said court, then and there by virtue of an order of said court; nor had all and every one of the jurors of the regular panel of the jurors summoned and in attendance at the said term of the said court for the first week thereof, failed in their attendance at the said April term of said court for the first week thereof; nor had the regular panel of the jurors summoned and in attendance upon the said court at the said term thereof, as liable to serve as jurors for the first week, been gone through with, then and there to constitute a grand jury to serve at the said term of said court, by lot, when the names of the said six grand jurors above mentioned were drawn, by lot, to serve as grand jurors for the said term of said circuit court; nor were all the above named six grand jurors, nor any one of them, summoned by the sheriff of said county from the bystanders, then and there to serve as jurors for the first week of this said term of said court. (*Conclude as ante, etc.*)

(1159) *Plea that goods which defendant was charged with rescuing from the sheriff, who had seized them under an execution against a third party, were in fact, at the time, the property of and in the possession of the defendant.(x)*

And now said A. K., protesting that he is not guilty of the premises charged in said indictment, and reserving a right to

(x) This plea was sustained by the supreme court of Massachusetts in Com. v. Kennards, 8 Pick. 133, as a bar to an indictment which is given *supra*, §75, charging the defendant with rescuing goods from the sheriff's custody. "The question," said Parker, C. J., "is reduced to this, whether the owner of goods which are in his actual possession may not lawfully defend his possession of them against a seizure or an attachment by an officer, who comes to take them on a precept against another person who has no right or interest in the goods.

"Certainly the officer in such case would be a trespasser, for he does not act under any precept against such owners, nor is he commanded to take their goods. Actions of trespass against officers thus transgressing are among the most common actions in our courts, and they depend upon the same principle as actions of assault and battery, or false imprisonment, by one who is arrested on a writ or warrant against another person. In such case there is no authority for the arrest, and the person making it, whether by mistake or design, is a mere trespasser. And the same facts which would sustain an action of trespass by the person ar-

waive this plea and plead anew at the court above, demands judgment of said indictment, and all and every part thereof, and

rested, will justify resistance which may be necessary to defend his personal liberty, short of injurious violence to the officer.

"We cannot distinguish between an officer who assumes to act under a void precept, and a stranger who should do the same act without any precept; for a command to arrest the person or seize the goods of B. is no authority against the person or goods of A. And an officer without a precept is no officer in the particular case in which he so undertakes to act. The officer must judge at his peril in regard to the person against whom he is commanded to act. This is said to be hard, but it is a hardship resulting from the voluntary assumption of a hazardous office, and considering that in all cases of doubt the officer may require indemnity before he executes his precept, the hardship is imaginary. *Marshall v. Hosmer*, 4 Mass. R. 63; *Bond v. Ward*, 7 Mass. R. 123.

"It is said that the owner of goods seized or attached on a precept against another, has legal remedies by action of replevin, trover, or trespass, and therefore ought not to be allowed to protect his goods with a strong hand, for this power may be abused so as to recover the property of the debtor, and so the creditor may be disabled from obtaining satisfaction. Such a mischief may happen: but it is not a fair argument against the existence of a right, that it may be abused. If the right did not exist, great abuses might come from the power in officers to take any person's property upon suspicion or suggestion that it belongs to the debtor, and the owner might be driven to a replevin, in which he must give bond with surety, or to his action for damages, in which the expense may consume the value of the property.

"But it is again said, that the rule sought to be established by the defence will deprive creditors of the power of trying the question of property in cases where there may be grounds to believe that it is covered by the person in possession claiming to be the owner. But the creditor is not without a legal remedy. He may have an action on the case for interrupting unlawfully his attachment. The officer may have an action of trespass if the goods are taken out of his possession. And the trustee process will compel the possessor to make full disclosure of his right to hold. And besides all this, the party is liable to indictment, and if he fails in making out his right strictly, will incur a severe penalty.

"It will be recollected that this is a criminal prosecution against persons who were in actual possession of the goods, being the acknowledged owners, or their servants to whose care they were committed; that they did nothing more than defend with no more than necessary force their possession. This decision, therefore, will form no precedent for cases which may be differently circumstanced. *Mooney v. Leach*, 1 W. Bl. 555; *Ackworth v. Kemp*, 1 Dougl. 40; *Sanderson v. Baker*, 2 W. Bl. 832.

"We have had no authorities cited on the part of the commonwealth which have any tendency to show that the owner and possessor of goods may not defend them against an officer who comes to seize them as another person's. That a man may defend his person, his lands, or goods, against the intrusion or invasion of those who have no lawful authority over them, would seem entirely unquestionable. If the officer believes the possession is only colorable, and the claim of property fraudulent, if backed by the creditor's orders, or secured by bond of indemnity, he will take care to be so attended as to be protected against insult in the execution of his precept.

"There are cases which show, that, if an officer having a precept against a person privileged from arrest, shall arrest him, he will not be a trespasser. But in such case he is commanded to arrest the particular person, and is supposed to know nothing of the privilege; the party therefore shall be held to apply for his discharge to the court having jurisdiction of the matter."

for plea says, as to the force and arms and whatever is against the peace in said first and second counts in said indictment mentioned, and the wounding therein supposed to be done, he is not guilty thereof in manner and form as he is charged therewith in said indictment, and of this he puts himself upon the country. And as to the residue of the offences charged in said indictment, and as to the assaulting, beating, bruising, evil treating, and forcibly and with a strong hand depriving of the care, custody, and keeping and possession of goods and chattels, the said K. says that said commonwealth ought not to prosecute and charge him therefor, because he says that said D. D. B., in said indictment mentioned, and one S. F. C., before and on the said second day of October last, and at the time when said offence is supposed to have been committed, were lawfully possessed of a certain shop in Congress Street, in said Boston, and of certain goods and chattels then and there in said shop, being the same goods and chattels in said second count in said indictment mentioned, which said goods and chattels were then and there the proper goods and chattels of said B. and C., and being so possessed and seised thereof, the said T. I. S., just before the said time, when, etc., to wit, on said second day of October, was unlawfully in said shop, and with force and arms making a great noise and disturbance, and at said time, when, etc., stayed and continued therein making such noise and disturbance, without leave or license, and against the will of said B. and C., and then and there, with force and arms, and with a strong hand, kept said B. and C. out of possession of said shop and of said goods and chattels, and then and there, and during a long time, disturbed said B. and C. in the use and enjoyment of said shop and of said goods and chattels, and greatly annoyed said B. and C. in the peaceable possession and enjoyment of said shop and of said goods and chattels, and thereupon the said B. then and there requested said S. to cease from making his said noise and disturbance, and to go and depart from said shop, and to give up and relinquish said goods and chattels to said B. and C., the lawful owners thereof, which S. then and there refused to do. Whereupon the said B. did specially pray and request said K. to aid and assist him the said B. in the defence of the possession of said shop and of said goods and chattels; and thereupon said

B. and K., in defence of said possession of said shop and of said goods and chattels, gently laid their hands upon said S. in order to remove him from said shop, and did then and there remove said S. from said shop and from said goods and chattels, as they lawfully might do for the cause aforesaid, doing the said S. no unnecessary harm or injury; all which are the same assaulting, beating, bruising, and evil treating, and with force and a strong hand depriving said S. of the care, custody, and possession of said goods and chattels in said first and second counts mentioned, and therein supposed to be done; and this said K. is ready to verify; wherefore he prays judgment of said indictment, whether said commonwealth ought or can prosecute him for the premises, and that he may be discharged thereof without day.

A. K.

(1160) *Replication.*

And now J. T. A., the attorney of said commonwealth, here in court agrees to the above reservation as to so much of said plea as that whereof the said A. puts himself on the country, for the commonwealth doth the like. And as to the rest and residue of said plea, he says, that the said commonwealth ought not, by reason of anything therein contained, to be precluded from prosecuting the said A. for the several matters and things in said indictment charged upon him; because he says that at the time in said indictment alleged, he the said A. committed the several assaults, batteries, and trespasses in said indictment set forth, of his own wrong, and without any such cause as he hath in pleading alleged; and this he prays may be inquired of by the country.

J. T. A., Attorney, etc.

And the said K. doth the like.

A. K.

CHAPTER II.

DEMURRERS.(a)

(1161) Demurrer to an indictment or information.

(1162) Joinder to same.

(1163) Demurrer to a plea in bar.

(1164) Joinder to same.

(1165) Demurrer to plea of *autrefois acquit*.

(1166) Joinder in demurrer to same.

(1161) *Demurrer to an indictment or information.*(b)

And the said J. S., in his own proper person, cometh into court here, and having heard the said indictment (*or* information) read, says, that the said indictment (*or* information) and the matters therein contained, in manner and form as the same are above stated and set forth, are not sufficient in law, and that he the said J. S. is not bound by the law of the land to answer the same; and this he is ready to verify; wherefore, for want of a sufficient indictment (*or* information) in this behalf, the said J. S. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment (*or* information) specified.

(1162) *Joinder to same.*(c)

And J. N., who prosecutes for the said state in this behalf, says, that the said indictment, and the matters therein contained, in manner and form as the same are above stated and set forth, are sufficient in law to compel the said J. S. to answer the same; and the said J. N., who prosecutes as aforesaid, is ready to verify and prove the same, as the court here shall direct and award; wherefore, inasmuch as the said J. S. hath not answered to the said indictment, nor hitherto in any man-

(a) See Wh. Cr. Pl. & Pr. § 400.

(b) Arch. C. P. 102. See Wh. Cr. Pl. & Pr. § 400.

(c) Arch. C. P. 103.

ner denied the same, the said J. N., who prosecutes as aforesaid, prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified.

(*The like form, mutatis mutandis, may be adopted in the case of informations.*)

(1163) *Demurrer to a plea in bar.*(d)

And J. N., who prosecutes for the said state in this behalf, as to the said plea of the said J. S., by him above pleaded, says that the same, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said state from prosecuting the said indictment against him the said J. S.; and that the said state is not bound by the law of the land to answer the same; and this he the said J. N., who prosecutes as aforesaid, is ready to verify; wherefore, for want of a sufficient plea in this behalf, he the said J. N. for the said state prays judgment, and that the said J. S. may be convicted of the premises in the said indictment specified.

(1164) *Joinder to same.*(e)

And the said J. S. says, that his said plea by him above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said state from prosecuting the said indictment against him the said J. S.; and the said J. S. is ready to verify and prove the same, as the said court here shall direct and award; wherefore, inasmuch as the said J. N., for the said state, hath not answered the said plea, nor hitherto in any manner denied the same, the said J. S. prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

(d) Arch. C. P. 103. See Wh. Cr. Pl. & Pr. § 400 *et seq.*

A demurrer to a plea in abatement is in the same form, except that it concludes with praying "judgment, and that the said indictment may be adjudged good, and that the said J. S. may further answer thereto," etc.

(e) Arch. C. P. 103.

The joinder is the same if the demurrer be to a plea in abatement, except that it concludes with praying "judgment, and that the said indictment may be quashed," etc.

(1165) *Demurrer to plea of autrefois acquit.*(f)

And J. K., who prosecutes for the said state in this behalf, cometh and saith, that for and notwithstanding anything in the said plea of the said J. A. and J. V., by them above pleaded, the said (state) ought further to prosecute them the said J. A. and J. V., by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; because he saith that the said plea, and the matters therein contained, are not sufficient in law to bar the said state from further prosecuting them the said J. A. and J. V., by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and this the said J. K. is ready to verify; wherefore he prays judgment, that the said state may further prosecute them the said J. A. and J. V., by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and that the said J. A. and J. V. may answer over to the same indictment.

(1166) *Joinder in demurrer to same.*

And the said J. V. and J. A., being now here as aforesaid, in their proper persons, under the custody of the said sheriff of the county of Middlesex, say, that the said plea of them the said J. V. and J. A. in form aforesaid above pleaded, and the matter therein contained, are sufficient in law to bar the said state from further prosecuting them the said J. V. and J. A., by reason of the premises in the said indictment to which the said plea is above pleaded, mentioned; and this they are ready to verify, etc.; wherefore, as before, they pray judgment, and that the said state may be barred from further prosecuting, by reason of the premises mentioned in the said indictment, to which the said plea of them the said J. V. and J. A. is above pleaded; and that they may be dismissed this court without day, etc.

(f) See Stark. C. P. 474; see *supra*, § 1150, note.

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